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THE mode of citation of this volume of the Western Australian Industrial Gazette will be as follows:—

95 W.A.I.G.

CUMULATIVE CONTENTS AND DIGEST APPEAR AT THE END OF THIS PUBLICATION

AWARDS/AGREEMENTS AND ORDERS—Variation of—

2015 WAIRC 00459

FURNITURE TRADES INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE FOREST PRODUCTS, FURNISHING AND ALLIED INDUSTRIES INDUSTRIAL UNION
OF WORKERS, WA

APPLICANT

-v-

ARTIFEX FURNITURE AND OTHERS

RESPONDENTS

CORAM

CHIEF COMMISSIONER A R BEECH

DATE

MONDAY, 22 JUNE 2015

FILE NO/S

APPL 125 OF 2008

CITATION NO.

2015 WAIRC 00459

Result

Application discontinued

Representation

No appearances

Order

WHEREAS The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA filed an application on 3 November 2008 and an amended application on 9 December 2008 pursuant to s 40 of the Industrial Relations Act, 1979 (the Act);

AND WHEREAS there had been no correspondence for this application since December 2008;

AND WHEREAS on 19 September 2012 the Full Bench of the Commission issued an order ([2015] WAIRC 00850) amalgamating The Forest Products, Furnishing and Allied Industries Industrial Union of Workers, WA and The Australian Workers' Union, West Australian Branch, Industrial Union of Workers and registering a new organisation to be known as The Australian Workers' Union, West Australian Branch, Industrial Union of Workers (the Union);

AND WHEREAS on 29 May 2015 the Commission wrote to the Union advising of its intention to discontinue the application unless the Union requested otherwise within 21 days;

AND WHEREAS there has been no contact from the Union;

NOW I, the undersigned, pursuant to the powers conferred on me by s 27(1)(a)(iv) of the Act, do hereby order –

THAT this application be discontinued.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

AGREEMENTS—Industrial—Retirement from—

2015 WAIRC 00502

NOTICE**AG 371 OF 1997****SOUTH METROPOLITAN YOUTH LINK (INC.) AGREEMENT 1997**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

No. APPL 125 of 2015

IN THE MATTER of the Industrial Relations Act 1979

and

IN THE MATTER of the filing in the Office of the Registrar of a Notice of Retirement from Industrial Agreement in accordance with section 41(7) of the said Act.

SMYL Community Services will cease to be a party to the *South Metropolitan Youth Link (Inc.) Agreement 1997*, on and from the 10th day of August 2015

DATED at Perth this 9th day of July 2015.

(Sgd.) S BASTIAN,

Registrar.

[L.S.]

CANCELLATION OF—Awards/Agreements/Respondents—

2015 WAIRC 00463

IRON AND STEEL INDUSTRY WORKERS' (AUSTRALIAN IRON AND STEEL PTY. LTD.) PRODUCTION BONUS SCHEME AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ON THE COMMISSION'S OWN MOTION
CORAM CHIEF COMMISSIONER A R BEECH
DATE THURSDAY, 25 JUNE 2015
FILE NO/S APPL 38 OF 2010
CITATION NO. 2015 WAIRC 00463

Result	Award cancelled
Representation	Ms S McGurk, Trades and Labor Council of WA Mr M Swinbourn, CFMEUW

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 8th day of March 2010 of an intention to make an order cancelling the award pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act");

AND WHEREAS the Commission served a copy of that notice and a notice of hearing for the 5th day of May 2010 on all named parties to the award;

AND WHEREAS the Commission advised the parties listed in s 29A(2)(a)(i) of the Act and attorneys general of the above;

AND WHEREAS on the 4th day of May 2010, the Construction, Forestry, Mining and Energy Union of Workers ("CFMEUW") filed a Notice of Objection to the cancellation on the basis that it is a common rule award;

AND WHEREAS on the 18th day of May 2010 the Commission issued Reasons for Decision [2010] WAIRC 00289 adjourning the cancellation of this award to enable further consideration to whether the cancellation should proceed;

AND WHEREAS the Commission, still being of the opinion that there was no employee to whom the award applied, did give notice on the 15th day of January 2015 of an intention to make an order cancelling the award pursuant to s 47 of the Act;

AND WHEREAS the Commission relisted this application for the 5th day of March 2015 to hear further submissions from the CFMEUW whether its objections were still maintained;

AND WHEREAS the Commission served a copy of the notice of hearing on the Master Builders' Association of Western Australia (Union of Employers) Perth ("MBA"), Australian Mines and Metals Association, the Chamber of Commerce and Industry of Western Australia (Inc) and UnionsWA for their information;

AND WHEREAS the MBA by letter dated the 10th day of February 2015 advised that it does not raise objection to the award being cancelled;

AND WHEREAS at the hearing on the 5th day of March 2015, the CFMEUW advised that it has no issue with the award being cancelled and that it is quite appropriate for it to be cancelled;

NOW I, the undersigned, pursuant to the powers conferred on me by s 47(1) of the Act, do hereby order –

THAT the *Iron and Steel Industry Workers' (Australian Iron and Steel Pty. Ltd.) Production Bonus Scheme Award* be cancelled.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00455

MINERAL SANDS MINING AND PROCESSING (ENGINEERING AND BUILDING TRADES) AWARD, 1977

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

ON THE COMMISSION'S OWN MOTION

CORAM

CHIEF COMMISSIONER A R BEECH

DATE

MONDAY, 22 JUNE 2015

FILE NO/S

APPL 86 OF 2010

CITATION NO.

2015 WAIRC 00455

Result

Award cancelled

Representation

Ms S McGurk, Trades and Labor Council of WA
Mr M Swinbourn, CFMEUW

BHP Billiton Nickel West Pty Ltd, by written correspondence

Order

WHEREAS the Commission, being of the opinion that there was no employee to whom the following award applied, did give notice on the 8th day of March 2010 of an intention to make an order cancelling the award pursuant to s 47 of the *Industrial Relations Act 1979* ("the Act");

AND WHEREAS the Commission served a copy of that notice and a notice of hearing for the 5th day of May 2010 on The Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union of Workers – Western Australian Branch; Communications, Electronic, Energy, Information, Postal, Plumbing and Allied Workers Union of Australia, Engineering and Electrical Division, WA Branch; and on all named parties to the award;

AND WHEREAS the Commission advised the Hon. Minister for Commerce, UnionsWA, the Chamber of Commerce and Industry of Western Australia (Inc) and the Australian Mines and Metals Association (Incorporated) of the above;

AND WHEREAS by letter dated the 14th day of April 2010 BHP Billiton Nickel West Pty Ltd (formerly Western Mining Corporation Limited) advised that it did not object to the cancellation of the award;

AND WHEREAS on the 4th day of May 2010, the Construction, Forestry, Mining and Energy Union of Workers ("CFMEUW") filed a Notice of Objection to the cancellation on the basis that it is a common rule award and may apply to employees of employers which are not constitutional corporations;

AND WHEREAS on the 18th day of May 2010 the Commission issued Reasons for Decision [2010] WAIRC 00289 adjourning the cancellation of this award to enable further consideration to whether the cancellation should proceed;

AND WHEREAS the Commission, still being of the opinion that there was no employee to whom the award applied, did give notice on the 15th day of January 2015 of an intention to make an order cancelling the award pursuant to s 47 of the Act;

AND WHEREAS the Commission relisted this application for the 5th day of March 2015 to hear further submissions from the CFMEUW whether its objections were still maintained;

AND WHEREAS at the hearing on the 5th day of March 2015, the CFMEUW advised it does not maintain its objection and has no position on whether the award should be cancelled;

NOW I, the undersigned, pursuant to the powers conferred on me by s 47(1) of the Act, do hereby order –

THAT the *Mineral Sands Mining and Processing (Engineering and Building Trades) Award, 1977* be cancelled.

[L.S.]

(Sgd.) A R BEECH,
Chief Commissioner.

2015 WAIRC 00462

PIPE, TILE AND POTTERY MANUFACTURING INDUSTRY AWARD

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ON THE COMMISSION'S OWN MOTION
CORAM CHIEF COMMISSIONER A R BEECH
DATE TUESDAY, 23 JUNE 2015
FILE NO/S APPL 95 OF 2010
CITATION NO. 2015 WAIRC 00462

Result Application discontinued
Representation No appearances

Order

I, the undersigned, pursuant to the powers conferred on me by s 27(1)(a)(iv) of the Act, do hereby order –
 THAT this application be discontinued.

[L.S.]

(Sgd.) A R BEECH,
 Chief Commissioner.

2015 WAIRC 00461

PLASTER, PLASTERGLASS AND CEMENT WORKERS' AWARD NO. A 29 OF 1989

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES ON THE COMMISSION'S OWN MOTION
CORAM CHIEF COMMISSIONER A R BEECH
DATE TUESDAY, 23 JUNE 2015
FILE NO/S APPL 96 OF 2010
CITATION NO. 2015 WAIRC 00461

Result Application discontinued
Representation No appearances

Order

NOW I, the undersigned, pursuant to the powers conferred on me by s 27(1)(a)(iv) of the Act, do hereby order –
 THAT this application be discontinued.

[L.S.]

(Sgd.) A R BEECH,
 Chief Commissioner.

NOTICES—Award/Agreement matters—

2015 WAIRC 00478

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 11 of 2015

APPLICATION FOR A NEW AGREEMENT TITLED**"ABORIGINAL LEGAL SERVICE OF WESTERN AUSTRALIA (INC) AGREEMENT 2015"**

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal Administrative, Clerical and Services Union of Employees* under the Industrial Relations Act 1979 for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

5 – APPLICATION AND PARTIES BOUND

5.1 The parties bound by this Agreement are:

- 5.1.1 The Aboriginal Legal Service of Western Australia (Incorporated); and
 5.1.2 The Western Australian Municipal, Administrative, Clerical and Services Union of Employees (WASU).
- 5.2 At the date of registration the approximate number of employees covered by this Agreement is 121.
 A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,

[L.S.]

Registrar.

30 June 2015

2015 WAIRC 00479

APPLICATION FOR A NEW AGREEMENT TITLED
"SHIRE OF MURRAY ENTERPRISE BARGAINING AGREEMENT 2015"

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal Administrative, Clerical and Services Union of Employees* under the Industrial Relations Act 1979 for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

2. Title

This Agreement shall be known as the Shire of Murray Enterprise Bargaining Agreement 2015, and shall apply to the employees under Schedule 1 of this Agreement.

...

5. Incidence and Parties Bound

...

- (d) This Agreement shall apply in the state of Western Australia to approximately 135 employees.
- (e) The parties to this Agreement shall be the Shire of Murray ("the Shire") and the Western Australian Municipal, Administrative, Clerical and Services Union of Employees, trading as the Western Australian Services Union (WASU) ("the Union") and those staff who are members of, or are eligible to be members of the Union and whose terms and conditions are under the:
- Local Government Officers' (Western Australia) Interim Award 2011.
 - Municipal Employees (Western Australia) Interim Award 2011.
 - Restaurant, Tearoom and Catering Workers' Award 1979.
 - Minimum Conditions of Employment Act 1993.

Schedule 1

Office of the Chief Executive Officer
 Marketing
 Corporate and Organisation Development
 Finance
 Customer Service
 Recreation and Community Development
 Tourism
 Planning and Development Services
 Planning
 Environmental Health
 Environment
 Technical Services
 Design and Asset Services

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,

[L.S.]

Registrar.

30 June 2015

2015 WAIRC 00495

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

Application No. AG 12 of 2015

APPLICATION FOR A NEW AGREEMENT TITLED**"SHIRE OF WAROONA OUTSIDE STAFF COLLECTIVE ENTERPRISE AGREEMENT 2015"**

NOTICE is given that an application has been made to the Commission by the *Western Australian Municipal Administrative, Clerical and Services Union of Employees* under the Industrial Relations Act 1979 for the registration of the above Agreement.

As far as relevant, those parts of the proposed Agreement which relate to area of operation and scope are published hereunder.

4 – INCIDENCE AND PARTIES BOUND

The parties to this Agreement are:

- 4.1 The Shire of Waroona; and
- 4.2 All employees of the Shire who are employed under a classification within the – Classification Definitions of this Agreement, and working at or from the:
- 4.2.1 Shire of Waroona Works Depot. 64 Thatcher Street, Waroona (i.e. - Operational employees, leading hands, team leaders, supervisors staff or those otherwise classified under Appendix A & B – Classification Definitions of this Agreement), including the following groups:
- 4.2.1(a) Parks Gardens & Reserves;
- 4.2.1(b) Works - Construction and Maintenance;
- 4.3 The Western Australian Municipal Roads Boards Parks and Racecourse Employees Union of Workers Perth.
- 4.4 The Western Australian Municipal Administrative Clerical and Services Union of Employees
- 4.5 The conditions of this Agreement apply to all apprentices, trainees and employees on a supported wage.

A copy of the proposed Agreement may be inspected at my office at 111 St. Georges Terrace, Perth.

(Sgd.) S BASTIAN,
Registrar.

[L.S.]

6 July 2015

INDUSTRIAL MAGISTRATE—Claims before—

2015 WAIRC 00500

WESTERN AUSTRALIAN INDUSTRIAL MAGISTRATES COURT

CITATION : 2015 WAIRC 00500

CORAM : INDUSTRIAL MAGISTRATE G. CICCHINI

HEARD : WEDNESDAY, 24 JUNE 2015

DELIVERED : THURSDAY, 9 JULY 2015

FILE NO. : M 92 OF 2014

BETWEEN : PRATYASHA GUNGABISSOON

CLAIMANT

AND
ASHANI HOLDINGS PTY LTD

RESPONDENT

Catchwords : Alleged contravention of *Children's Services Award 2010* (MA000120); Alleged payment of incorrect rate of pay; Alleged failure to pay annual leave entitlement upon termination.

Legislation : *Fair Work Act 2009*
Fair Work Regulations 2009
Industrial Magistrates Courts (General Jurisdiction) Regulations 2005

Instruments : Children's Services Award 2010 (MA000120)

Result : Claim proven in part

Representation:

Claimant : In Person

Respondent : Ms D Parbat (Director) of the Respondent

REASONS FOR DECISION

Overview

- 1 Ashani Holdings Pty Ltd (the Respondent), runs a child care centre known as Bright Sparks Early Learning Centre. In 2013 the Respondent employed Ms Pratyasha Gungabissoon (the Claimant) as a part-time Child Care Support Worker. It is not in dispute that the *Children's Services Award 2010* (MA000120) (the Award) governed her employment.
- 2 Although the Claimant was not able to articulate the commencement date of her employment, payslips and payroll journals produced by the parties indicate that she commenced her employment with the Respondent in or about early February 2013. She remained in that employment until she resigned on 16 October 2013.
- 3 Upon appointment, the Respondent's director, Ms Dhana Parbat informed the Claimant that she would be paid at the rate of \$16.32 per hour and that the number of hours she would be required to work would be dependent on the needs of the Respondent. The Claimant initially worked two hours per day (3:00pm to 5:00pm), but was soon asked to work extra hours. By the second week of her employment she was working five to six hours per day and then in March 2013, she was asked to work seven and a half hours per day from 7:00am to 3:30pm Monday to Friday with a one hour lunch break.
- 4 From about March 2013 onwards the Claimant worked in the kitchen commencing at 7:00am each morning for between one and one and a half hours. She was required to prepare morning tea, lunch and afternoon tea. She worked alone in the kitchen, save for the first couple of days when trained. Apart from preparing food, she was also required to check and record fridge and food temperatures. Her duties also included the monitoring of stock levels and ordering of food supplies as required. She was also required to clean the kitchen and food utensils.
- 5 After completing her kitchen duties, the Claimant would assist child care workers, mainly in the babies and toddlers' rooms. On some occasions she assisted in the kindy room. It was her duty to replace the qualified child-care worker whilst that person was at lunch for an hour. During that time she worked unsupervised. Her duties in those areas included preparing baby bottles, cleaning food spills, changing nappies and participating in children's activities such as painting and reading. At the end of each day, she was required to wash all of the dishes in the kitchen. That pattern of work continued until her employment ended.
- 6 On 12 August 2013 the Claimant's pay rate was increased to \$16.75 per hour. The Claimant was paid at that increased rate until her employment ended.
- 7 The Claimant's employment ended in October 2013. The Claimant had intended to give Ms Parbat one weeks' notice of her resignation by personally handing her the notice on Monday 14 October 2013, however as things turned out, Ms Parbat did not attend work that day. Consequently, she gave Ms Parbat her resignation letter the following day. The next day (Wednesday) Ms Parbat asked the Claimant not to come to work for the remainder of the week. The Claimant accepted that. On the available evidence it appears that there was a mutual agreement reached between the parties that the Claimant's employment would end on Wednesday, 16 October 2013 rather than Friday, 18 October 2013.
- 8 Soon after her employment came to an end the Claimant confronted Ms Parbat about annual leave entitlements not paid to her on termination. The two of them became involved in a verbal altercation in which the Claimant was warned to leave the Respondent's premises and not return. Consequently the Claimant complained to the Fair Work Ombudsman (FWO) about her unpaid leave entitlements.
- 9 As a result of the investigation into the complaint, the FWO determined that Respondent owed the Claimant \$3,456.31. That amount is comprised of underpaid wages in the sum of \$1,741.08, and \$1,715.23 in outstanding annual leave entitlements. The FWO determined that the Claimant had been paid the incorrect hourly rate of pay rate for her position as a Level 1.1 Support Worker.
- 10 The Claimant adopted that determination and commenced this action on 24 June 2014, in which she seeks to recover \$3,456.31. As a consequence of the Respondent's submissions that followed the institution of the proceedings, the FWO reviewed his findings and on 9 September 2014 wrote to the Claimant. I have regard to that letter pursuant to regulation 35(2) of the Industrial Magistrates Court (General Jurisdiction) Regulations 2005. In that letter, dated 9 September 2014, the FWO said, inter alia:

"According to the documents provided you were classified by the Company as a Level 1.1 employee and were being paid your ordinary hours at the rate of \$16.75 per hour.

While this rate of pay was correct for a Level 1 employee, the FWO has determined that the Company had incorrectly classified your Level of employment under the Award. Based on your indicative duties the Company should have classified you as a Level 2.1 employee and subsequently this resulted in the underpayments identified in the Determination of Contravention."
- 11 It is clear that the FWO resiled from his previous position that the Claimant had been paid at the incorrect rate. Indeed the FWO accepted that the Claimant had been paid her correct hourly rate. The basis for the FWO alleging underpayment had changed.

Issues

- 12 The following issues require resolution:
 1. Was the Claimant paid her correct rate of pay as a Level 1.1 Support Worker?
 2. In any event should she have been classified as a Level 2.1 Support Worker and if so, what was her correct rate of pay at that level?
 3. Was the Claimant, on the termination of her employment, paid her annual leave entitlements, and if not, what is she owed?

Was the Claimant Paid Her Correct Rate of Pay as a Level 1.1 Support Worker?

- 13 The Claimant was initially paid an hourly rate of \$16.32 which was increased to \$16.75 on 12 August 2013. She continued to receive \$16.75 per hour until her employment ended.
- 14 Although the FWO in his initial findings suggested that the Claimant was entitled to higher hourly rates, he later accepted that the Claimant had been paid at her correct hourly rates. That concession was rightly made. Indeed there is no evidentiary material before me which contradicts that conclusion. I find that the Respondent had in fact paid the Claimant her wages at the correct applicable hourly rate, save that as a consequence of the 2012 Annual Wage Review, the Claimant's hourly rate increased from \$16.32 to \$16.75 with effect from 1 July 2013. The Respondent delayed the implementation of that increase until 12 August 2013. It follows that the Claimant was underpaid as Level 1.1 Support Worker in the period between 1 July 2013 and 11 August 2013.

Should the Claimant have been classified at a higher level?

- 15 The indicative duties for Level 1 and Level 2 employees are contained in Clause 3.2 (Support Worker) of Schedule B of the Award, which provides:

"B.2 Support Worker

B.2.1 Level 1

This is an untrained, unqualified employee. Employees at this level will work under supervision with guidance and direction.

(a) Indicative duties

- *Assisting a qualified cook and/or basic food preparation and/or duties of a kitchen hand.*
- *Laundry work.*
- *Cleaning.*
- *Gardening.*
- *Driving.*
- *Maintenance (non-trade).*
- *Administrative duties.*

(b) Progression

An employee will progress to Children's Services Support Employee (CSSE) Level 2 after 12 months, or earlier if the employee is performing the duties of a children's Services support employee Level 2.

B.2.2 Level 2

An employee at this level will possess skills, training and experience above that of a CSSE Level 1 and below that of a CSSE level 3. An employee at this level works under routine supervision and exercises discretion consistent with their skills and experience.

Indicative duties

- *Assisting a qualified cook and/or basic food preparation and/or duties of a kitchen hand.*
- *Laundry work.*
- *Cleaning.*
- *Gardening.*
- *Driving.*
- *Maintenance (non-trade).*
- *Administrative duties."*

- 16 Relevantly Clause B.1.2 of Schedule B of the Award sets out the criteria and indicative duties of a Level 2 Children's Services Support Employee. It provides:

"B.1.2 Level 2

This is an employee who has completed 12 months in Level 1, or a relevant AQF Certificate II, or in the opinion of the employer has sufficient knowledge and experience to perform the work within the scope of this level. An employee at this level has limited knowledge and experience in children's services and is expected to take limited responsibility for their own work.

Indicative duties

- *Assist in the implementation of the children's program under supervision.*
- *Assist in the implementation of daily care routines.*
- *Develop awareness of and assist in maintenance of the health and safety of the children in care.*
- *Give each child individual attention and comfort as required.*
- *Understand and work according to the centre or service's policies and procedures.*
- *Demonstrate knowledge of hygienic handling of food and equipment."*

- 17 The evidence before me, much of which is uncontroversial, establishes that the Claimant had the responsibility to run the kitchen on a daily basis preparing morning tea, lunches and afternoon tea. She generally worked alone and unsupervised in cooking meals. She was responsible for monitoring the temperature of both food and equipment. She was also responsible for keeping an eye on stock levels and ordering stock when required. When not working in the kitchen, she performed duties in the

children's rooms both supervised and unsupervised. Notwithstanding that the Claimant had no formal qualifications and had less than 12 months experience in the industry, she performed daily duties indicative of a Level 2 employee.

- 18 Ms Parbat, on behalf of the Respondent, submitted that the kitchen duties performed by the Claimant were a minor and incidental part of her duties. Indeed, such duties were such a minor part of her work generally, that she ought not to be classified as a Level 2 worker.
- 19 With respect, I disagree with Ms Parbat. The evidence indicates that the Claimant worked alone in the kitchen on a daily basis for one to one and a half hours each day. She had responsibility for the kitchen and effectively ran it. In doing so, she demonstrated knowledge of hygienic handling of food and equipment. Her duties and responsibilities were greater than that of a Level 1 employee. In arriving at that determination I have accepted the Claimant's testimony. I found her to be an honest witness.
- 20 It follows from what I have said that the Claimant was not paid at the correct rate. From March 2013 until 30 June 2013 she should have been paid at an hourly rate of \$16.95, which was the correct Award rate for a Level 2.1 Support Worker. From 1 July 2013, the Claimant should have been paid at an hourly rate of \$17.39. The Claimant was underpaid 63 cents for each hour worked from March 2013 to 30 June 2013. From 1 July 2013 until 11 August 2013, she was underpaid \$1.07 for the 130.5 hours she worked. Thereafter, the Claimant was underpaid 64 cents for each hour worked until her employment ended.
- 21 Working from the Respondent's payroll journal, which is annexed to the Claimant's Claim, I am able to determine the hours worked by the Claimant. It appears from the information therein, that her hours increased from around mid-March 2013. I find therefore, that the Claimant commenced working in the kitchen from around that time. I find that the Claimant worked a total of 492.75 hours from mid-March 2013 until 30 June 2013. She was underpaid 63 cents for each of those hours, amounting to \$310.43. Between 1 July 2013 and 11 August 2013, the Claimant was underpaid a total of \$139.64. Thereafter, she worked a total of 339.25 hours and was underpaid 64 cents for each of those hours, amounting to \$217.12.
- 22 The Respondent has, in breach of Clause 14 of the Award, underpaid the Claimant \$667.19. That occurred as a result of the Respondent applying the incorrect classification to her.

Annual Leave Entitlements

- 23 The Claimant asserts that she was not paid her annual leave entitlements upon the termination of her employment. The Respondent initially suggested that payment had been made, but did not produce any evidence showing that payment. The party asserting payment bears the onus of proving the same on the balance of probabilities. During the course of the Trial, Ms Parbat indicated that she does not know whether the annual leave payment was made.
- 24 In that regard, the Claimant produced her bank statements of the account into which the Respondent deposited her pay (Exhibit 1). It suffices to say that Exhibit 1 does not disclose the payment of annual leave entitlements to the Claimant. In view of that, and the Claimant's testimony that she has not been paid her annual leave entitlements, I find that to be the case. Indeed, the non-payment of her annual leave entitlements gave rise to the Claimant's complaint to the FWO and this Claim. If payment had been made, the matter is unlikely to have progressed to this point.
- 25 Having determined that the Claimant was not paid her annual leave entitlements, I move to consider the quantum of that entitlement.
- 26 Ms Parbat suggested in her testimony and submissions that the Claimant is entitled to only 71 hours of annual leave. She said that although the Claimant would have been entitled to 78.5 hours of annual leave, an amount of seven and a half hours (equivalent to one day) had been deducted from her entitlements on account of the Claimant not having given sufficient notice of her resignation.
- 27 In my view, that deduction was both inappropriate and impermissible. On her own case, Ms Parbat contends that the Claimant's employment was terminated by mutual agreement. That being the case, the requirement for notice to be given fell away. The Respondent cannot have it both ways. In the particular circumstances, the Respondent was not entitled to deduct seven and a half hours from the Claimant's annual leave entitlement.
- 28 On Ms Parbat's reckoning, the Claimant was owed 78.5 hours of annual leave, however Exhibit 1 indicates an entitlement of 78.655 hours.
- 29 The Claimant claims to be entitled to 80.89 hours of annual leave. That is based on what the FWO determined her entitlement to be. She has, however, not produced any evidence that would substantiate that figure. On the available evidence (Respondent's payroll journal) I can go no farther than to find that she is owed 78.655 hours of annual leave entitlements. The Respondent has failed to comply with Clause 24 of the Award by failing to pay the Claimant those annual leave entitlements and annual leave loading thereon.
- 30 I find that the Claimant is entitled to annual leave entitlements, and 17.5% annual leave loading as follows:
- annual leave - 78.655 hours @ \$17.39 = \$1,367.81; and
 - leave loading - \$1,367.81 x 0.175 = \$239.37

The total amount payable with respect to the Claimant's annual leave and leave loading is \$1,607.18.

Conclusion

- 31 I find that the Claimant is owed \$2,274.37 (\$667.19 plus \$1,607.18). I order that the Respondent pay her that amount.
- 32 In addition, I order, pursuant to section 547 of the *Fair Work Act 2009*, that the Respondent pay to the Claimant interest on that amount. The appropriate interest payable is 6% per annum calculated from 17 October 2013 until Judgement. The interest payable is at 0.374 cents per day. The total of interest payable is for 631 days totalling \$235.99.
- 33 I order the Respondent to pay to the Claimant \$ 2,510.36, which is inclusive of interest.

G. CICCHINI
INDUSTRIAL MAGISTRATE

POLICE ACT 1892—APPEAL—Matters Pertaining To—

2015 WAIRC 00464

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00464
CORAM : CHIEF COMMISSIONER A R BEECH
 COMMISSIONER S J KENNER
 COMMISSIONER S M MAYMAN
HEARD : THURSDAY, 12 MARCH 2015, FRIDAY, 13 MARCH 2015, THURSDAY 2 APRIL 2015
DELIVERED : THURSDAY, 25 JUNE 2015
FILE NO. : APPL 19 OF 2014
BETWEEN : SUSAN LEANNE MORAN
 Appellant
 AND
 THE COMMISSIONER OF POLICE
 Respondent

CatchWords : Removal of Police Officer – Loss of confidence by Commissioner of Police – Officer permanently unfit for duty - Removal due to medical incapacity - Appeal against removal – Whether removal harsh, oppressive or unfair to be judged objectively – Distinction between submissions and grounds of appeal

Legislation : *Industrial Relations Act 1979* (WA) s 80ZE
Interpretation Act 1984 (WA) ss 18, 19, 19(2)
Occupational Safety and Health Act 1984 (WA) ss 3(4), 19
Police (Medical and Other Expenses for Former Officers) Act 2008 (WA)
Police Act 1892 (WA) ss 8, 11, 33Q, 33Q(4), 33Q(4)(a), 33Q(4)(b), 33Q(4)(b)(i), 33L, 33L(1), 33L(2), 33M, 33M(1), 33M(2), 33P, 33P(2)(a), 33R, Pt IIB
Police Amendment Act 2003 (WA)
Workers' Compensation and Injury Management Act 1981 (WA)
Industrial Relations Commission Regulations 2005 (WA) reg 91(1)(a)(i)-(iv)
Police Force Regulations 1979 (WA) regs 6A01, 6A02 - 6A08, 6A10, 6A11, 1306, 1402, 1402(1), 1402(4), Pt VIA

Result : Appeal dismissed

Representation:
Appellant : Mr K Moran, as agent
Respondent : Ms S Teoh, of counsel
Solicitors:
Respondent : State Solicitor's Office of Western Australia

Case(s) referred to in reasons:

Carlyon v Commissioner of Police (2005) 85 WAIG 708
Deborah Gay Bachelor v Skybus (1983) 63 WAIG 2244
Fletcher v Nott (1938) 60 CLR 55
In re Loty and Holloway v Australian Workers' Union (1971) 71 AR 95
Jarratt v Commissioner of Police (2005) 224 CLR 44
Jones v Commissioner of Police [2007] WAIRC 00440; (2007) 87 WAIG 1101
Kyriakopoulos v James Hardie & Company Proprietary Limited (1970) 37 SAIR 91
McKay v Commissioner of Police [2006] WASC 189; (2006) 155 IR 336
Menner v Commissioner of Police (1997) 74 IR 472
Moran v The Commissioner of Police (2015) 95 WAIG 185
R v Young (1999) 46 NSWLR 681
The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited (1920) 28 CLR 129

The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch (1985) 65 WAIG 385

Reasons for Decision

BEECH CC:

- 1 The Commissioner of Police removed Senior Constable Susan Moran from the WA Police under s 8 of the *Police Act 1892* (the Act) with effect from 17 July 2014. Ms Moran appeals her removal on the basis that it was harsh, oppressive or unfair.

Background

- 2 Ms Moran was inducted into the WA Police on 23 July 1990 and graduated in December 1990. Ms Moran served in the metropolitan area, Newman and, in the last 10 years of her 24 years' service, at Geraldton. The majority of her duties were general duties and as coronial officer.
- 3 She faced many stressful duties and situations and experienced many traumatic incidents over her career. In her witness statement and in her response to Project Recompense, Ms Moran set out examples of some of the more stressful duties she undertook and incidents she encountered; there are more than 30 such examples over three and a half pages of her statement. The following four pages of her statement set out in considerable detail the effect this had upon her physical and emotional health and wellbeing. It is not necessary to detail them.
- 4 Ms Moran commenced paid sick leave either on 10 December 2012 or on 18 January 2013. She received regular treatment and counselling through her GP. On 14 February 2013 she was referred to Ms Giannini, the vocational rehabilitation consultant in Health and Welfare Services, a process which occurs once an officer has taken 80 hours or more continuous sick leave.
- 5 In the conversation she had with Ms Moran on 28 February 2013, Ms Giannini specifically recalls Ms Moran saying she had serious doubts about her ability to return to work at all and was considering medical retirement. Ms Moran's evidence of the conversation is that it was Ms Giannini who raised whether Ms Moran had considered medical retirement, to which Ms Moran replied that she was not prepared to return to work to become sick again. I have not found it necessary to resolve this difference in their evidence.
- 6 After a further conversation with Ms Moran on 23 May 2013, Ms Giannini scheduled an appointment for her to see the consultant psychiatrist, Dr Piirto. In a report dated 21 June 2013, Dr Piirto diagnosed Ms Moran with chronic Post Traumatic Stress Disorder (PTSD) and a Major Depressive Disorder which is chronic and in partial remission. Dr Piirto concluded that Ms Moran met the criteria for medical retirement.
- 7 Ms Moran accepted the opinions of the various doctors about whether she was able to return to work as a police officer and did not object to their opinions. In her evidence in this appeal, Ms Moran accepted that she will never return to work as a police officer.
- 8 In June 2013 Senior Sergeant Bryan, the manager of the Welfare Unit which is part of Health and Welfare Services, wrote to Ms Moran's treating medical practitioners requesting contemporary medical information, a diagnosis, a prognosis and an opinion as to whether Ms Moran had the capacity to work as a police officer. A number of medical reports were obtained from Ms Moran's treating medical practitioners who expressed the opinion that Ms Moran was not fit to return to work as a police officer.
- 9 In January 2014 the Assistant Director HR of Health and Welfare Services requested that a medical board be convened under regulation 1402 of the Police Force Regulations (the Regulations) to determine Ms Moran's fitness for further active service.
- 10 On 13 February 2014, Ms Moran received an email from Senior Sergeant Bryan advising her that arrangements had been made for her attendance at a medical board. Ms Moran asked in reply what that entailed, whether she would be questioned about her illness and who sits on the medical board. She replied on 20 February 2014 that she had decided not to attend it as she believed it would cause her considerable stress which she would not cope with well.
- 11 Senior Sergeant Bryan advised her that she was required to attend and if she did not do so the Commissioner of Police may cease to continue her paid sick leave entitlements. Ms Moran replied acknowledging that she realised she had no choice but to attend, and asking for her termination payment details.
- 12 Ms Moran attended the medical board on 11 March 2014, producing a document titled 'Notice of intent' (attachment 3 to the Commissioner of Police's answer of 2 September 2014) directed to the chairman of the medical board, the Commissioner of Police, the Minister for Police, and the Premier of WA. It states:

I hereby indicate my intent to bring litigation before the Western Australian Industrial Relations Court in accordance with section 33L of the Police Act due to my impending medical removal from the WA Police Service.

My emotional, mental and physical health have been seriously compromised by my duties imposed upon me by the Commissioner of Police during my service to the State of Western Australia.

This harm caused to my health throughout my service of twenty three years will result in my medical removal from the WA Police Service, which is manifestly cruel, harsh, oppressive and unfair. This removal will be harmful to my future life, happiness and that of my family.
- 13 The report of the medical board (attachment 2) is dated the same day. It states:

Susan Moran attended a medical board on 11 March 2014. She has worked for Western Australian Police for 22 years and managed to cope with the many difficult situations she confronted in the job. However with time coping with the violence she has faced has become more difficult. By the time she left work she had profound difficulty coping with any stress, was hyper vigilant and angry about her situation.

Since leaving work she has improved but still becomes anxious and defensive when she has contact with her former employment. We feel if Susan attempted to return to the work for Western Australian Police it would heighten her emotional problems in spite of therapy.

Thus we feel Susan Moran is unfit for work within Western Australian Police however with time she should be able to cope in a non confronting environment working for another employer.

- 14 On 24 March 2014, the Director Human Resources of WA Police sent a memorandum to the Commissioner of Police advising the conclusion of the medical board and attaching a notice under s 33L(1) of the Act for his consideration.
- 15 On 31 March 2014, the Commissioner of Police sent Ms Moran a notice of intention to remove (NOITR) under section 33L(1) of the Act. The NOITR stated that the Commissioner of Police intended to recommend her removal from the Police Force 'on medical grounds' because he is not satisfied that Ms Moran is 'able to continue to perform the duties of a police officer due to [her] Post Traumatic Stress Disorder and Major Depressive Disorder'. The notice invited Ms Moran to submit within 21 days any information she would like the Commissioner of Police to take into account in determining her suitability to continue as a police officer.
- 16 Ms Moran's response to the NOITR is dated 22 April 2014 (attachment 5). It is headed 'Notice of Appeal' and its eight pages contain much that she has written and submitted in this appeal.
- 17 On 19 May 2014, the Commissioner of Police sent Ms Moran a notice of his decision that he still did not have confidence in her ability to continue as a member of the Police Force because her PTSD and Major Depressive Disorder meant that Ms Moran was not able to continue to perform the duties of a police officer. It advised that, accordingly, he intended to recommend immediately to the Minister for Police that she approve Ms Moran's removal on medical grounds. The notice advised Ms Moran that she would be paid a 'maintenance payment' in accordance with s 33M of the Act for the period of 28 days after the date upon which she is removed. Ms Moran remained on sick leave on full pay until that point.
- 18 The Commissioner of Police's recommendation to the Minister is dated 19 May 2014. On 26 May 2014 Ms Moran wrote to the Minister for Police requesting consideration of the circumstances she outlined, to which the Minister replied. The Minister approved the Commissioner of Police's recommendation on 30 June 2014.

The Commissioner of Police's reasons for removal

- 19 The reasons the Commissioner of Police removed Ms Moran are contained in his Answer filed 2 September 2014 and in the reformulated reasons filed 6 February 2015. Without repeating what is set out above, it is sufficient to record that the Commissioner of Police says he was not satisfied Ms Moran was able to continue to perform the duties of a police officer due to her PTSD and Major Depressive Disorder. In her response to the NOITR, Ms Moran did not dispute the fact that she was no longer fit to perform the duties of a police officer.
- 20 The Commissioner of Police states that on 27 March 2013, Ms Moran advised the WA Police Vocational Rehabilitation Consultant that both her general practitioner and psychiatrist felt that she would not be able to return to work in the foreseeable future and should be medically retired, and that she stated she felt that she could no longer work effectively as a police officer. The medical board convened on 11 March 2014 had deemed that Ms Moran was unfit for work within WA Police and that if she attempted to return to work for WA Police, it would heighten her emotional problems in spite of therapy.
- 21 Ms Moran's response to the NOITR did not dispute that she was no longer fit to perform the duties of a police officer and the Commissioner of Police says that he still did not have confidence in Ms Moran's ability to continue as a member because he was still not satisfied, by reasons of her PTSD and Major Depressive Disorder, that she was able to continue to perform the duties of a police officer. Ms Moran was removed and given a 28 day maintenance payment pursuant to s 33M of the Act.
- 22 The Commissioner of Police says that where all of the evidence demonstrates that a member of the WA Police is no longer medically fit for further active service, it is open for him to lose confidence in the member's performance for the purpose of s 33L(1) of the Act and the Commissioner of Police owes a duty to the WA Police and to the community generally to remove the member on medical grounds under s 8 of the Act.
- 23 The Commissioner of Police did not have confidence in her ability to continue as a police officer because he was not satisfied, by reason of her PTSD and Major Depressive Disorder, that she was able to do so.

The grounds of appeal

- 24 The grounds in Ms Moran's notice of appeal filed 1 August 2014 are:

Harsh – My proposed removal was harsh by being so ruthless in its intent. Although it is provided in section 33L, to discard me, an officer of 22 years of meritorious duty struck down by an illness proven to be the result of such service without any acknowledgement of this service except the payment of wages for a month upon removal. Such an action can be nothing but harsh.

Oppressive – As a Senior Constable I was now required to challenge my Commissioner as to the validity of his decision; and that in its very nature an oppressive situation for me a relatively very junior officer. It may not be an intended situation, but it exists in all such circumstances – Also upon my commencing sick leave and the subsequent medical requirements and examinations, I was placed in a situation of no power but to conform and that is not challenged; but it was a domineering factor in my life of which I had no control. This is an oppressive situation.

Unfair – Can it not be anything else but unfair that an officer of 22 years of meritorious duty struck down by an illness proven to be the result of her service is then sacked as a result of this job caused illness.

This is without any acknowledgement and compensation for a job related illness and 22 years of service, except the insult of payment of wages for a month upon removal.

Again I claim there is no argument that can contradict the immoral action of and subsequent malicious reality of this action.

The case presented by Ms Moran

- 25 Mr Moran, who appeared on behalf of his daughter in the hearing, presented a wide-ranging oral submission over three days of hearing. Mr Moran described the substance of his presentation as 'a human story of how Senior Constable Moran was removed in a harsh, oppressive and unfair manner overlaid by the destruction of her dignity'.
- 26 Mr Moran presented his submissions under different headings although in many cases, the points he made under one heading were repeated under later headings. Most of the points can be identified, and summarised, at ts 199 where Mr Moran addressed the requirement in s 33Q(4)(a) of the Act for the Commission to take into account 'the interests' of Ms Moran.
1. Removing Ms Moran under s 8 of the Act meant she was placed in the company of those officers removed due to unacceptable behaviour, either criminal or regulatory. There is shame associated with being removed from service under s 8. This was not in her interest.
 2. Her removal was not under s 11 and this was not in her interest.
 3. Ms Moran was subject to a process that was harsh, oppressive and unfair throughout her removal from the police and caused her much anguish, particularly relating to the detrimental and potentially dangerous effects upon her emotional state due to her PTSD and this was not in her interest.
 4. A person should be trained to mentor her and prevent further trauma and deterioration of her mental state and to lead her through the process.
 5. After two and a half decades of loyal and exemplary service Ms Moran did not receive a farewell function from the local police station where she had been for 10 years and this unkindness was devastating and it caused a demolishing of her dignity. This was not in her interest.
 6. She did not receive even a letter from the Commissioner of Police thanking her for 24 years of exemplary service and that further demolished her dignity. This was not in her interest. In her view, to be so pitilessly discarded further increased her distress and lack of worth.
 7. Ms Moran's feeling of worth was shattered by her sacking and diminished assistance to her family and that is not in her interest.
 8. Ms Moran's full recovery is deemed unlikely by the medical practitioners who consulted with her on instruction from the Commissioner of Police in that she may recover to near normal state in five years and may live a regular life until, as indicated by medical research, she will relapse into a state of chronic post-stress disorder and chronic major depressive order and that is not in her interest.
 9. Her removal was without compensation or pension and that is not in her interest. Her likelihood of obtaining employment in the near future is fraught with difficulties for her and subsequently for any employer and that is not in her interest. The standard of living for herself, partner and family will be diminished to a lower socioeconomic level as she foregoes lost wages that will run into \$1.3 million plus presumed loss of wage increases and continued superannuation payments. This is not in her interest.
- 27 Mr Moran also submits that Ms Moran's PTSD and chronic depression was the result of a failure of the Commissioner of Police's duty of care towards her and that, although she replied to the NOITR, Ms Moran received no response to her reply and the Commissioner of Police did not respond to any of the matters raised by her in it. Mr Moran says she should not have been removed until discussions between the State government and the WA Police Union result in a compensation scheme for medically retired police officers. Alternatively, Ms Moran should have been retained until the government offered an ex gratia payment to her. Ms Moran referred to the publicly-reported circumstances of another police officer who has not been removed pending determination of an ex gratia payment, and to another officer who received a compensation payment for his injuries.
- 28 Ms Moran gave evidence in the hearing and was cross-examined. Mr Moran tendered a number of documents in support of the submissions he made.

The case presented by the Commissioner of Police in response

- 29 The Commissioner of Police submits that he is not required to retain a police officer indefinitely who is no longer fit to perform the duties of a police officer. It is not in the public interest for him to retain, on paid sick leave, police officers who are permanently unfit for duty, for an indeterminate period of time, particularly given his duty as a public officer to ensure that unwarranted expenses are avoided. He has a statutory duty to maintain public confidence in the WA Police and to remain confident in his members' suitability, having regard to the special nature of the relationship between himself and members of the WA Police.
- 30 Where all of the evidence demonstrates that a member is no longer medically fit for further active service into the foreseeable future, it is open to the Commissioner of Police to lose confidence in the member's performance for the purposes of s 33L(1) of the Act. In those circumstances he owes a duty to the WA Police and to the community generally to remove the member on medical grounds under s 8.
- 31 The Commissioner of Police says that although Ms Moran alleges that the removal process under s 8 was unfair due to the 'stigma' attached to loss of confidence proceedings, this issue is beyond the scope of the appeal. In the alternative, the removal process under s 8 is not unfair and the Commissioner of Police followed the process set out by Parliament in the Act and Regulations in a fair and appropriate manner.
- 32 A police officer removed on medical grounds is entitled to a 28-day maintenance payment under section 33M(1) of the Act and payment of any unpaid annual leave and long service leave. The Commissioner of Police submits that he complied with those

requirements and paid Ms Moran accordingly. In "exceptional circumstances", the Minister may direct that a maintenance payment under s 33M(1) shall be paid to the member for a specified period, not exceeding six months but ending on the day any appeal instituted under s 33P is determined. The discretion lies with the Minister and not with the Commissioner of Police. The amount of 'compensation' to which a medically retired police officer is entitled is prescribed by Parliament in the Act and it would be beyond the power of the Commission to go behind the legislation by ordering payment of compensation contrary to Parliament's intention, particularly where the process followed was not unfair, harsh or oppressive.

- 33 In response to the circumstances of other police officers referred to by Ms Moran, the Commissioner of Police submits that this is beyond the scope of the grounds of appeal. Alternatively, the circumstances of others are an exception to the general rule. Further, it is not for the Commission to "stand in the Commissioner's shoes" and proclaim that it would have done something different. It cannot substitute its view for the view of the Commissioner of Police.

Consideration

- 34 The issue to be decided in the appeal is whether the decision of the Commissioner of Police to take removal action in the case of Ms Moran was harsh, oppressive or unfair: *McKay v Commissioner of Police* [2006] WASC 189; (2006) 155 IR 336. It is up to Ms Moran to establish that it was harsh, oppressive or unfair.
- 35 Whether the decision of the Commissioner of Police to take removal action in the case of Ms Moran was harsh, oppressive or unfair is to be judged objectively. While Ms Moran's appeal, and her evidence, shows that she considers her removal to be harsh, oppressive and unfair, the issue is not decided by her subjective view. Any harsh effect on her is relevant but of course not conclusive.
- 36 Ms Moran's grounds of appeal address 'harsh', 'oppressive' and 'unfair' separately, however the reasons why Ms Moran says her removal was 'harsh' overlap with the reasons why she says it was 'unfair'. In both grounds she refers to:
- her length of service,
 - her illness which was proven to be the result of her service as a police officer, and
 - the fact that her removal was without acknowledgement of her service except for the payment of one month's wages.
- 37 A separate, but related, reason Ms Moran says her removal was unfair is that she was sacked after becoming ill when her illness resulted from her job.
- 38 Ms Moran's grounds why she says her removal was harsh or unfair may be considered together. Her ground for saying that her removal was oppressive may be considered separately.
- 39 Without limiting the matters to which the Commission is otherwise required or permitted to have regard in determining the appeal, the Act in s 33Q(4) requires the Commission to have regard to —
- (a) the interests of Ms Moran; and
 - (b) the public interest which is taken to include —
 - (i) the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force; and
 - (ii) the special nature of the relationship between the Commissioner of Police and members of the Force.

- 40 The interests of Ms Moran include the matters arising out of her grounds of her appeal and I now consider them.

Grounds of appeal – whether harsh or unfair

- 41 These two grounds essentially are that it was harsh or unfair that Ms Moran was removed due to a work-caused illness after 24 years' service without any acknowledgement of her service except the payment of wages for a month upon removal.
- 42 The facts within those grounds are not disputed: Ms Moran was removed due to a work-caused illness which meant that she could no longer work as a police officer; at the time of removal, she did have 24 years' service; she received no acknowledgement of that service and she received one month's wages upon removal.
- 43 If the decision about whether Ms Moran's removal was harsh, oppressive or unfair was to be decided only on those facts, her task would be more straightforward. There is, of course, far more to an objective judgment of whether Ms Moran's removal was harsh or unfair than just that Ms Moran was removed due to a work-caused illness after 24 years' service without any acknowledgement of her service except the payment of wages for a month upon removal.
- 44 It is convenient to use headings to identify the points in Mr Moran's submissions.

Removal

- 45 The ground is that it cannot 'be anything else but unfair that an officer of 22 years of meritorious duty struck down by an illness proven to be the result of her service is then sacked as a result of this job caused illness.' Ms Moran could no longer perform the duties of a police officer from the time she commenced paid sick leave on 18 January 2013, although it is not entirely clear from the evidence when she commenced to suffer from chronic PTSD and a Major Depressive Disorder. Ms Moran remained on paid sick leave from then until her removal on 17 July 2014.
- 46 Therefore, Ms Moran was not removed from the time she could no longer perform the duties of a police officer but 17 months later. For that 17 months she was on sick leave and was paid her wages. The period of paid sick leave she received was a total of 2,334 hours and amounted to \$100,828 in payments to her over that period.
- 47 Further, Ms Moran does not dispute the fact that she was no longer fit to perform the duties of a police officer. Retaining her for a longer period would not result in her eventually becoming fit to return to work. She accepts the reason for her removal

(Appellant's Rejoinder, 21 October 2014 at 24). She also recognises, correctly in my view, that the Commissioner of Police is not required to keep indefinitely an officer who can no longer perform any of the duties of a police officer. This is consistent with the conclusion reached by the Commission in an earlier appeal under s 33P of the Act: *Jones v Commissioner of Police* ([2007] WAIRC 00440 at 70) where the view of Fielding C was endorsed when he said in *Deborah Gay Batchelar v Skybus* (1983) 63 WAIG 2244:

An employer is not obliged to keep the former position open indefinitely, but only for a reasonable time. In considering the question of fairness or otherwise of any dismissal which results in circumstances such as these, consideration should be given to the employee's past service record, and the efforts made to rehabilitate after the injury.

- 48 Mr Moran submits that Ms Moran should not have been removed, and should have been retained as an officer, until there are arrangements agreed between the state government and the WA Police Union for compensation to be paid to ill officers when they are removed. However, on the material presented to the Commission, discussions regarding a compensation scheme for ill officers when they are removed have been occurring for some time and there is no indication that they will result in a scheme of compensation at any definite time in the future. Mr Moran's submission would mean the Commissioner of Police would have to retain Ms Moran indefinitely when he is not required to do so.
- 49 Once it is recognised that the Commissioner of Police is not required to keep Ms Moran indefinitely, the ground that it cannot 'be anything else but unfair that an officer of 22 years of meritorious duty struck down by an illness proven to be the result of her service is then sacked as a result of this job caused illness' loses considerable force.

Comparison with others

- 50 Ms Moran says her removal was harsh in comparison with another constable who can no longer perform his duties due to illness and who will remain in the WA Police until he receives an ex gratia payment.
- 51 The Commissioner of Police confirms that the other constable has been retained pending determination of his ex-gratia payment but says that his circumstances are exceptional and distinguishable from Ms Moran's circumstances. In the view of the Commissioner of Police, Ms Moran still has the capacity to work in the future whereas the other constable will never work again. It does not set a precedent, and each case has to be considered on its own merits.
- 52 The circumstances of the making of a request for an ex gratia payment for the other constable are not known to the Commission however it is a request that is before the Attorney General. Ms Moran does not have a request for an ex gratia payment before the Attorney General.
- 53 Ms Moran's response to the NOITR headed 'Notice of Appeal' (Respondent's Answer, attachment 5 at p7) did include a request for an ex gratia payment:

I would therefore request the withdrawal [of] the *Notice to Removal On Medical Grounds* of me from Service and you continue to pay my wages as contracted under the terms related to my conditions of Engagement my giving my Oath on 23 July 1990 until the current situation relating to Compensation sought by the Union is dealt with by the appropriate Court; or - I be offered a ex-Gratia with the suggested amount to be five years' wages of a Senior Constable, as that is the period determined before I obtain an equilibrium to my life, but with expected lapses for the rest of my life.

- 54 Ms Moran admitted in cross-examination that this request was to the Commissioner of Police but she believed the Commissioner could forward it on. It is not for the Commissioner of Police, and not even for the Minister for Police, but for the Attorney General to grant an ex-gratia payment. Ms Moran has not made a request to the Attorney General; therefore the submission that Ms Moran has been treated unfairly compared with the other constable because she was not retained pending determination of an ex-gratia payment for her is not made out.
- 55 Ms Moran also submits she has been treated unfairly in comparison with another medically retired constable however the response of the Commissioner of Police at 32 is that this constable was medically retired prior to any ex-gratia payment being finalised; consequently, Ms Moran has been treated the same as this constable. The Commissioner of Police says that like this constable, it is open to Ms Moran to apply to the Attorney General at any time for an ex-gratia payment. Ms Moran's submission is not made out.
- 56 Ms Moran is able to apply to the Attorney General for an ex-gratia payment, however the Commissioner of Police is not obliged to retain her while this occurs.
- 57 For those reasons, the ground that it cannot 'be anything else but unfair that an officer of 22 years of meritorious duty struck down by an illness proven to be the result of her service is then sacked as a result of this job caused illness' is not made out.

The Use of Section 8 to remove Ms Moran

- 58 Ms Moran was removed under s 8 of the Act which Mr Moran describes as a 'flawed process'. Mr Moran made a spirited attack on the use of s 8 in her case, largely because it is the section used to remove 'miscreants, breakers of rules and those of criminal bent': to remove sick and injured officers under such a provision 'is demeaning and destructive of a constable's dignity'; it is 'an abnormal treatment of the citizens' constables and quite unexpected in our society as well as being cruel punishment for becoming ill because of her duties'. His submission is that s 8 of the Act is an 'unfair law' and the 'stigma' attached to the use of s 8 would have been avoided if Ms Moran had been removed using s 11 of the Act.
- 59 Mr Moran submits that his criticism of the use of s 8 in Ms Moran's case is supported in the *Report on Part IIB of the Police Act 1892 Pursuant to the Review Conducted Under s 33Z of the Act* (24 February 2006, Legislative Council Tabled Paper No 1171). The Report notes (at 23) that the genesis of a loss of confidence action is a complaint or information which goes to the issue of a member's suitability to perform the duties to the standard demanded. At 65, the Report notes that it would be disappointing to think that s 8 could be used to dispose with the services of a member of the WA Police injured in the course of his or her duties and who is no longer able to perform policing duties. It states that matters of medical fitness and the capacity to perform duties are health and welfare issues which should not find their resolution under Part IIB of the Act.

- 60 In reply, the Commissioner of Police acknowledges that the process to be followed in Part IIB of the Act, other than for the extensive loss of confidence process set out in reg 6A02 to reg 6A08, is the same regardless of whether the removal is for integrity reasons or medical reasons but emphasises that removal under s 8 is not intended to attack Ms Moran's integrity; it is simply the process of removing a police officer from office once the medical board has made a finding that they are no longer fit for duty. It is a managerial decision rather than a finding of guilt.
- 61 It is significant that Ms Moran's grounds of appeal are not that her removal was unlawful but that her removal was harsh, oppressive or unfair. To the extent that Mr Moran made submissions that the use of s 8 was unlawful, the submissions are not relevant to Ms Moran's appeal and cannot be considered.
- 62 Even if it was to be considered, the power in s 8 is merely a power to remove. It was not argued that the language of s 8 does not permit the removal of an officer who can no longer perform the work of a police officer due to work caused illness, and I proceed on the basis that the language of s 8 does permit it.
- 63 The comment in the Report above that 'matters of medical fitness and the capacity to perform duties are health and welfare issues which should not find their resolution under Part IIB of the Act' is a comment on the 'loss of confidence' process under Part IIB of the Act. Before s 8 can be used, the Commissioner of Police is required to lose confidence in the member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct. In my view, Ms Moran's appeal has not shown that the Commissioner of Police was wrong to use s 8, nor that Ms Moran's removal was harsh or unfair because it was used.

Loss of confidence

- 64 It is the loss of confidence requirement in s 33L(1) that Ms Moran refers to in her evidence that caused her to feel a loss of dignity when she was removed only because she is permanently ill through a work caused illness and cannot resume duty as a police officer. It is that the Commissioner of Police loses confidence in the suitability of Ms Moran to continue in the WA Police when she has long and unblemished service and, through no fault of hers, finds herself unable to return to work.
- 65 The Commissioner of Police submits that the issue as to whether there is a 'stigma' attached to the loss of confidence process is not part of the grounds of appeal. In my view, the loss of confidence process is an inherent part of Ms Moran's removal and I am prepared to consider it as part of why she says her removal was harsh or unfair.
- 66 That there is a loss of dignity is supported by the comments made by the Minister for Police at the WA Police Union 2013 Annual Conference reported in the Police News. The Minister is reported as saying that she would overhaul the process of removing medically unsound officers:
- 'I believe we can do that better but I don't believe that Officers who are medically unfit should have to go through the humiliation of a loss of confidence process. In addition, the introduction of medical expenses for work-related injuries for retired police officers has shown we support those Officers who left the Agency's employment.'
- 67 The Minister's comments are not about Ms Moran's removal; they are about medically unfit officers having to go through a loss of confidence process. This appeal is not about medically unfit officers having to go through a loss of confidence process. It is about Ms Moran's removal and although the process of removal is the same whether it is commenced due to medical retirement or otherwise, I do not agree that in Ms Moran's case the loss of confidence process, viewed objectively, made her removal harsh or unfair.
- 68 This is because in her case the NOITR is headed 'Removal on medical grounds'. It makes clear that her illness is the only reason the Commissioner of Police is not satisfied that Ms Moran is able 'to continue to perform' the duties of a police officer.
- 69 The removal notice (p 52) is also headed 'Removal on medical grounds' and says the reason the Commissioner of Police does not have confidence in her ability to continue is by reason of her PTSD and Major Depressive Disorder.
- 70 Further, the extensive loss of confidence process set out in reg 6A02 to 6A08 did not apply in Ms Moran's case because removal action was taken when the medical board reported under reg 1402(4) that she was unfit for further active service.
- 71 Furthermore, there is no suggestion that the Commissioner of Police lost confidence in Ms Moran for any reason going to her integrity, honesty, competence, poor performance or conduct in the work she had performed as a police officer over her long service. The Commissioner of Police did lose confidence in her suitability to continue as a police officer, but it was because of her PTSD and Major Depressive Disorder.
- 72 On the evidence, Ms Moran ended her service with the WA Police with her integrity, her honesty, her competence, her past performance as a police officer and her conduct intact.

Whether Section 11 should have been used

- 73 Mr Moran's submission, and Ms Moran's evidence, is that there would have been no loss of dignity if her removal had been under s 11 of the Act. Ms Teoh, for the Commissioner of Police, correctly points out that it is the use of s 8 which leads to the right of appeal in s 33P and which is an important safeguard against s 8 being used harshly, oppressively or unfairly; there is no such right of appeal attaching to the use of s 11 of the Act.
- 74 Also, to the extent that Ms Moran believes her removal was harsh because her removal was accompanied by a payment of only one month's wages, s 11 of the Act would not have resulted in any payment to her at all because it does not prescribe any payment to be made to a removed officer. Neither does s 11 permit the Minister for Police to consider whether there are exceptional circumstances to extend the payment beyond one month to a maximum of 6 months.
- 75 In my view, the issue of the use of s 11 is not an issue relevant to the determination of the appeal. The issue to be decided in the appeal is whether the decision of the Commissioner of Police to take removal action in the case of Ms Moran was harsh, oppressive or unfair. Ms Moran was not removed under s 11 of the Act. Whether if she had been removed under s 11 her

removal would not have been harsh or unfair is hypothetical. It does not of itself help to decide whether Ms Moran's removal under s 8 was harsh, oppressive or unfair.

- 76 Ms Moran has not shown that the decision to remove her is harsh or unfair by reason of its timing, nor by comparison with the circumstances of two other officers, from the use of s 8 nor from the loss of confidence process itself.

Removal was without any acknowledgement of her service ...

- 77 It is a fact that the Commissioner of Police did not acknowledge Ms Moran's service. On the material in this appeal, there is no reason provided as to why he did not do so. He could have done so and, in consideration of Ms Moran's service, should have done so. It is long service. It was a significant part of Ms Moran's life and a significant length of time for her to have served the public of WA in a difficult and stressful and, at times from her evidence, thankless but essential job.

...except the payment of wages for a month upon removal

- 78 Ms Moran has pointed to the one month's payment to her upon her removal as a completely inadequate measure of both her worth after 24 years of service and her removal which was due to no fault on her part.
- 79 This payment is prescribed by s 33M of the Act and it is helpful to set it out:

33M. Maintenance payment

- (1) If removal from office occurs by or as a result of removal action taken in accordance with section 33L, the member is entitled to receive a maintenance payment for the period of 28 days after the day on which the member is removed.
- (2) In relation to a period after the 28 day period referred to in subsection (1), the Minister may, in exceptional circumstances, direct that a maintenance payment shall be paid to the member for a specified period.
- (3) For the purpose of subsection (2), the specified period is such period not exceeding 6 months as is specified by the Minister but in any event ending on the day any appeal instituted under section 33P is determined by the WAIRC.
- (4) Any maintenance payment is to be calculated on the basis of the salary of the member at the time of removal from office.

- 80 During the hearing, and in some documents, the payment was sometimes referred to as compensation. It is not prescribed as such. It is prescribed as a maintenance payment. Its purpose, as described in the Explanatory Memorandum to the *Police Amendment Bill 2002* and by Ms Teoh at ts 294/295, is to address what had been seen prior to the amendment as an incentive for a police officer to appeal a recommendation that he or she be removed because they continued to be paid while their appeal was determined; as a consequence of the change made in 2002, a removed officer will no longer be paid during the appeal process and the one month payment was prescribed instead.
- 81 Additionally, it provided for the Minister for Police, in exceptional circumstances, to direct that the maintenance payment be paid for a specified period not exceeding six months and ending on the day any appeal is determined.
- 82 The Commissioner of Police points out, correctly, that under the Act, Regulations and industrial agreement there is no other provision which provides for the Commissioner of Police to grant compensation for removal on medical grounds. He submits that for that reason the 28 day payment must be seen as being fair: the entitlement to the payment is prescribed by Parliament and every medically retired police officer receives the same payment.
- 83 It is correct to say that any officer who is removed due to medical incapacity is entitled to receive the same payment, however it is not a payment made only to an officer who is removed due to medical incapacity, and it is not a payment made because they have been removed due to medical incapacity. In fact any officer who is removed under s 8 is entitled to receive the same payment.
- 84 Importantly, it is not a payment 'for a readjustment into society' as Mr Moran described. Nor is it an acknowledgement of her service or a measure of Ms Moran's worth after 24 years of service. This is important because to the extent that Ms Moran's appeal is based upon her understanding that it was those things, it is based upon a misunderstanding. The ground of appeal is that her removal is 'without any acknowledgement and compensation for a job related illness and 22 years of service, except the insult of payment of wages for a month upon removal'. It is not an insult to Ms Moran because it is not at all related to Ms Moran's circumstances. It cannot be referred to as an inadequate compensation payment because Ms Moran does not have an entitlement to compensation for her removal for medical incapacity, however it is open to Ms Moran to request the Minister for Police under s 33M(2) to extend the one month payment paid to her. She has not done so, although she is still able to do so.
- 85 There was much in Mr Moran's submission about the need for a compensation scheme in WA for police officers who are removed due to medical incapacity. Mr Moran provided details of the compensation schemes in other States at the Commission's request.
- 86 Mr Moran tendered a statement made by the Commissioner of Police reported in the Police News August 2013 saying that 'the system we have got at the moment is not fair on the Officers who are sick' and that '...there needed to be a compensation scheme in place for Officers who were 'broken' at work'.
- 87 The Commissioner of Police responded in the Reformulated Reasons at 48 and 49 that his statement needs to be considered in the context in which it was made. He is concerned about the increasing number of non-operational police officers in the agency and the need for more police officers on the frontline. Consequently, while he acknowledges that there are a number of issues with the system, he does not accept that the process by which Ms Moran was removed was unfair and points out that Ms Moran was treated the same as other officers in similar circumstances in accordance with the process set out in legislation.

The Commissioner of Police submitted in the Reformulated Reasons at 38 that while there may be a perception held by some that the process is unfair, he is nevertheless bound to follow that process.

- 88 In my view the Commissioner of Police is bound to follow the process. It is the procedure which the Parliament has provided for the removal of police officers. He is not free to depart from that procedure. The Act does not provide for the Commissioner of Police to pay compensation to Ms Moran when she is removed. Both the Commissioner of Police, and this Commission for that matter, must apply the law of the land.
- 89 For that reason, the part of the ground that Ms Moran's removal was harsh or unfair because the payment of wages to her was only one month's wages is not made out.

Removal was for a Job-Caused Illness

- 90 The additional part of Ms Moran's grounds of appeal is that her removal was unfair in that she was sacked after becoming ill when her illness resulted from her job. This ground would have greater force if Ms Moran had been removed when she first commenced sick leave. The fact that she was not removed until 17 months later, and that her past and future work-related medical expenses are paid, means it loses much of its force as ground of appeal. This ground is not made out.

Grounds of appeal – whether oppressive

- 91 In relation to whether her removal was oppressive, Ms Moran says she was obliged to challenge the Commissioner of Police as to the validity of his decision. As this ground of appeal is in Ms Moran's response to the NOITR, I understand it to refer to the intention of the Commissioner of Police to remove her. The 'challenge' was to respond to the NOITR.
- 92 The 'challenge' is the opportunity provided to Ms Moran under the Act to respond to the NOITR. It is a necessary part of a fair process that before the Commissioner of Police acts upon his intention, he gives her an opportunity to show why he should not remove her. It is not of itself a reason why the decision to remove Ms Moran is oppressive.
- 93 Ms Moran may have found it oppressive to her to have to respond given her medical circumstances, but it is a step in a process which gave her an opportunity to be heard before the decision was made.
- 94 I accept too that when Ms Moran was required to produce sick leave certificates and to attend subsequent medical requirements and examinations, she was placed in a situation where she had to comply with the requirements of WA Police. However those requirements are lawful and reasonable from an administrative point of view.
- 95 The ground that the decision to remove Ms Moran is oppressive is not made out.

Other matters not in the grounds of appeal but raised in submissions

- 96 The Commission can only decide Ms Moran's appeal on the grounds she set out in her notice of appeal. When she wrote her notice of appeal, she was able to appeal on any grounds she thought appropriate which would show that the decision to remove her was harsh, oppressive or unfair. Having chosen the grounds, they become the only reasons she can argue why the decision to remove her was harsh, oppressive or unfair. They are the appeal. The only submissions Mr Moran may relevantly make, and the only submissions the Commission may validly consider, are submissions within those grounds.
- 97 Any submission made by Mr Moran not within those grounds cannot be relevant to the appeal that has been made. The Commission cannot take an irrelevant submission into account.
- 98 The submissions presented by Mr Moran on his daughter's behalf were wide ranging and in some instances raised an issue not within a ground of appeal. I have read all the submissions and appreciate the sincerity with which they were made. For that reason only, I now refer briefly to them.
- 99 There is no ground of appeal that the reason why the decision to remove Ms Moran was harsh, oppressive or unfair is because there is no longer a common law constable in the WA Police Force. His submissions about whether police officers are employees, and about the history and concept of a common-law constable are not part of the appeal Ms Moran has made.
- 100 Mr Moran's submissions that s 8 of the Act is an unfair law, and that a ruling under that law can be ignored, likewise does not arise from a ground of appeal. In any event, the Commission is a quasi-judicial tribunal which deals with industrial matters and it must apply the law as it stands. Issues regarding morals and ethics and the law, and the 'need for a judicial forum to deny the power of a law that breaches the moral and ethical standards of a society it purports to represent', which were part of Mr Moran's submissions, are broad and beyond the scope of the appeal.
- 101 Mr Moran submitted much material regarding the duty of care owed to officers by the Commissioner of Police. Mr Moran is correct that the Commissioner of Police owed Ms Moran a duty of care under the *Occupational Safety and Health Act 1984* from 3 January 2004 when that Act was amended. However, as Ms Teoh correctly submitted, the grounds of appeal do not allege the Commissioner of Police breached his duty of care to her. It is not an issue which arises in her appeal and cannot be considered. It is not disputed that Ms Moran's illness was work-caused.

Conclusions

- 102 For the reasons given above, Ms Moran's grounds of appeal are largely not made out. She has shown that although she had 24 years' service the Commissioner of Police did not acknowledge her service or length of service. It was submitted that there is no requirement for the Commissioner of Police to acknowledge Ms Moran's service or length of service and this is correct. The Commissioner of Police did follow the Act and it is not suggested that the Commissioner of Police did not do so.
- 103 However the removal of an officer can be harsh, oppressive or unfair even though the Commissioner of Police correctly follows the Act. Whether an officer's removal is harsh, oppressive or unfair will depend upon a consideration of the circumstances of the case including the interests of the officer and the public interest which is taken to include the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force and the special nature of the relationship between the Commissioner of Police and members of the Force.

- 104 It was in Ms Moran's interest that the Commissioner of Police acknowledge her service and length of service. On the evidence, the lack of acknowledgement is a part of the removal process which resulted in her feeling she had been worth 'nothing'. Objectively, the service and length of service of a long serving police officer who is being removed through no fault of their own ought to be acknowledged. The work Ms Moran performed as she outlined in her evidence is of importance for the community she served. She had faced many challenging and difficult issues. Ms Moran's service was worthy of acknowledgement. However the NOITR and the notice of her removal were formal and impersonal.
- 105 The public interest which the Commission is required to take into account includes the importance of maintaining public confidence in the integrity, honesty, conduct and performance of members of the Police Force. It is undoubtedly correct, as the Commissioner of Police submits, that it is important that he maintains public confidence in WA Police and remain confident in his officers' suitability, having regard to the special nature of the relationship between him and members of the WA Police, and it would not be in the public interest for him to retain on paid sick leave officers who are permanently unfit for duty for an indeterminate period of time.
- 106 Although Mr Moran submitted that it adds 'insult to the injury' for the Commissioner of Police to declare that Ms Moran's removal was in the public interest, saying that her removal was manifestly not in the public interest as her condition remains for the rest of her life, it nevertheless is important that the public has confidence in the ability of police officers to perform the work of the police and the Commissioner of Police does have a duty to maintain that public confidence.
- 107 The public interest in maintaining the public confidence in the performance of members of the Police Force still would be met even if Ms Moran's removal had been done with a proper recognition of her service and length of service. The Commissioner of Police could have referred to her service and length of service in the NOITR or the notice of removal or in a separate letter to her.
- 108 On the evidence in this appeal, there is much to be said for the statement in the Report that matters of medical fitness and the capacity to perform duties are health and welfare issues which should not find their resolution using the loss of confidence process. It is not appropriate for it to be used in relation to an officer with long and faithful service to the WA Police and the community it serves who can no longer perform the work required due only to a work caused illness. Nevertheless, for as long as these issues do find their resolution under Part IIB of the Act, a letter or a statement from the Commissioner of Police which appropriately recognises the past service of an officer removed through no fault of their own for medical reasons may well lessen the 'humiliation' of the loss of confidence process.
- 109 Similarly, although the Commissioner of Police did consider Ms Moran's response to the NOITR, he did not respond to any of the matters raised in itMs Moran; he merely noted that she did not demonstrate she was fit to perform the duties of a police officer. Ms Moran's response was 8 pages long and in my view it merited at least a response to the matters she raised.
- 110 These two issues however do not lead to the conclusion that Ms Moran's appeal itself is made out. They are a consideration, but are not of themselves determinative of Ms Moran's appeal. Overall, the grounds of appeal are otherwise not made out. The Commissioner of Police was not obliged to retain Ms Moran indefinitely and on the evidence, Ms Moran would still have been removed even if the Commissioner of Police had responded to the matters in her response to the NOITR; these have been largely raised and considered in this appeal and there is nothing to suggest that if the Commissioner of Police had responded to those matters, Ms Moran would not have been removed. Balancing all of the evidence, the failure to recognise Ms Moran's service and length of service, while inconsiderate, does not establish that the decision to remove Ms Moran was harsh oppressive or unfair.
- 111 Therefore her appeal is dismissed. That is not to say that the removal of an officer who is unable to return to work due to a work-caused illness can never be harsh, oppressive or unfair. Each case will depend upon its own circumstances and the grounds upon which the appeal is made.

KENNER C:

- 112 Police officers in this State are not regarded as employees at common law, or for the general purposes of industrial and employment legislation, unless specifically provided. This has consequences. One of them, which has been highlighted in the present case, is that police officers injured in the course of their employment, resulting in either a physical or psychiatric injury, are not, as the law presently stands, entitled to workers' compensation, as all other employees are. They have other arrangements in place. Moreover, it has been the practice that for those police officers deemed medically unfit to continue to serve the community they are subject to a medical retirement process under the Regulations 1979. They may be ultimately removed from the Police Force by the Commissioner of Police, under s 8 of the Act.
- 113 Ms Moran was appointed as a police constable in July 1990. She subsequently became a senior constable. Ms Moran was based at the Geraldton Police Station, which is the town where she lives. On 27 March 2013, after a period of absence from the workplace, Ms Moran's treating medical practitioners concluded that Ms Moran was not able to return to work as a police officer in the foreseeable future, as a consequence of her illness. Medical retirement was proposed. Whilst Ms Moran initially hoped to be able to return to work as a police officer, Ms Moran came to accept the opinion of her treating doctors.
- 114 On 21 June 2013, the Commissioner of Police's consulting psychiatrist formally diagnosed Ms Moran with PTSD (Chronic) and Major Depressive Disorder (Chronic) and concluded that Ms Moran met the established criteria for medical retirement. Medical reports obtained by the Commissioner of Police, from Ms Moran's treating psychiatrist and general practitioner, confirmed the Commissioner of Police's conclusion that Ms Moran was not fit for duty as a police officer, either then or in the future. Ms Moran did not return to work as a police officer but remained on paid sick leave.
- 115 Later, in March 2014, a medical board was established under reg 1402 of the Regulations. The medical board concluded that based on the material before it, Ms Moran was medically unfit for work as a police officer and that for her to return to work as a police officer, would aggravate her condition. None of the medical diagnoses, nor the opinion of the medical board, were disputed by Ms Moran. As a result of the medical board determination, the Commissioner of Police commenced the process for

removal of Ms Moran under s 8 and Part IIB of the Act. On 19 May 2014, the Minister of Police approved the Commissioner of Police's request for the removal of Ms Moran from the Police Force.

116 The removal action by the Commissioner of Police is now challenged by Ms Moran, as being harsh, oppressive and unfair. The grounds of Ms Moran's appeal are as follows:

The reasons why the decision was harsh, oppressive or unfair are -

Harsh - My proposed removal was harsh by it being so ruthless in its intent. Although it is provided in section 33L, to discard me, an officer of 22 years of meritorious duty struck down by an illness proven to be the result of such service without any acknowledgement of this service except the payment of wages for a month upon removal. Such an action can be nothing but harsh.

Oppressive- As a Senior Constable I was now required to challenge my Commissioner as to the validity of his decision; and that in its very nature an oppressive situation for me a relatively very junior officer. It may not be an intended situation, but it exists in all such circumstances - Also upon my commencing sick leave and the subsequent medical requirements and examinations, I was placed in a situation of no power but to conform and that is not challenged; but it was a domineering factor in my life of which I had no control. This is an oppressive situation.

Unfair - Can it not be anything else but unfair that an officer of 22 years of meritorious duty struck down by an illness proven to be the result of her service is then sacked as a result of this job caused illness.

This is without any acknowledgement and compensation for a job related illness and 22 years of service, except the insult of payment of wages for a month upon removal.

Again I claim there is no argument that can contradict the immoral action of and subsequent malicious reality of this action.

117 Ms Moran originally sought the following relief:

The relief sought is :

I would therefore request the withdrawal the Notice to Removal On Medical Grounds of me from Service and you continue to pay my wages as contracted under the terms related to my conditions of Engagement my giving my Oath on 23 July 1990 until the current situation relating to Compensation sought by the Union is dealt with by the appropriate Court; or - I be offered a ex-Gratia with the suggested amount to be five years' wages of a Senior Constable, as that is the period determined before I obtain an equilibrium to my life, but with expected lapses for the rest of my life.

118 However, during the course of the hearing of the appeal, Ms Moran indicated that she no longer sought to be reinstated but rather, seeks compensation for loss.

119 At the outset of these reasons I wish to observe what this appeal is not about. A substantial portion of the submissions of Ms Moran, and documents produced by her, were directed to the issue of compensation schemes in other Police Force jurisdictions, available to officers who are medically retired or injured in the course of duty and the unfairness of the absence of such a scheme in this jurisdiction. However, the present appeal concerns whether the removal of Ms Moran was, within the statutory framework of the Act in Part IIB, harsh, oppressive or unfair. The Commission can only be concerned with the specific circumstances of Ms Moran and her removal from the Police Force in this State.

Interpretation of sections 8, 11 and 33L of the Police Act

120 An issue that arose during the course of the hearing of this appeal was the scope of s 8 of the Police Act and specifically, whether the Commissioner of Police can rely on it for the purposes of the removal of a police officer on the grounds of medical retirement.

121 Ms Moran contended that s 8, when read with the relevant provisions of Part IIB were not able to be used by the Commissioner of Police to remove a police officer on the grounds of medical retirement. If an Officer is to be removed on these grounds, then Ms Moran submitted that s 11 of the Police Act should be used instead.

122 It is convenient to set out the relevant statutory provisions now. The most apposite are ss 8 and 33L of the Police Act which are in the following terms:

8. Commissioned and non-commissioned officers, removal of

- (1) The Governor may, from time to time as he shall see fit, remove any commissioned officer of police, and upon any vacancy for a commissioned officer, by death, removal, disability, or otherwise, the Governor may appoint some other fit person to fill the same; and the Commissioner of Police may, from time to time, as he shall think fit, suspend and, subject to the approval of the Minister, remove any non-commissioned officer or constable; and in case of any vacancy in the Police Force by reason of the death, removal, disability or otherwise of any non-commissioned officer or constable, the Commissioner of Police may appoint another person to fill such vacancy.
- (2) The powers of removal referred to in subsection (1) can be exercised only if the Commissioner of Police has complied with section 33L and that removal action has not been revoked under section 33N(1).
- (3) Subsection (2) does not apply where a person is removed from a commissioned office to be appointed to another commissioned office so long as that appointment —
 - (a) is to an office at a level not less than the level of the office from which the person was removed; or
 - (b) is made with the consent of the person.
- (4) Subsection (2) does not apply to the removal of a police probationary constable.

...

33L. Notice of loss of confidence to be given before removal action is taken

- (1) If the Commissioner of Police does not have confidence in a member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct, the Commissioner may give the member a written notice setting out the grounds on which the Commissioner does not have confidence in the member's suitability to continue as a member.
 - (2) If a notice is given to a member under subsection (1), the member may, before the expiration of the period of 21 days after the day on which the notice is given or such longer period as is allowed by the Commissioner of Police, make written submissions to the Commissioner of Police in respect of the grounds on which the Commissioner has lost confidence in the member's suitability to continue as a member.
 - (3) After the end of the period referred to in subsection (2), the Commissioner of Police shall —
 - (a) decide whether or not to take removal action; and
 - (b) give the member written notice of the decision.
 - (4) The Commissioner of Police shall not decide to take removal action unless the Commissioner —
 - (a) has taken into account any written submissions received from the member under subsection (2) during the period referred to in that subsection; and
 - (b) still does not have confidence in a member's suitability to continue as a member, having regard to the member's integrity, honesty, competence, performance or conduct.
 - (5) If the Commissioner of Police decides to take removal action —
 - (a) the notice under subsection (3)(b) shall advise the member of the reasons for the decision;
 - (b) except to the extent that the regulations otherwise provide, the Commissioner shall, within 7 days of giving the notice of the decision under subsection (3)(b), provide to the member a copy of any documents and make available to the member for inspection any other materials that were examined and taken into account by the Commissioner in making the decision; and
 - (c) the removal action may be taken when, or at any time after, the notice under subsection (3)(b) is given.
- 123 By the Police Amendment Act 2003, the Police Act was substantially amended to introduce subsections (2) to (4) in s 8 and a new Part IIB was also inserted, providing for the process of removal of police officers under s 8 and an appeal to the Commission from such removal, on grounds that the removal action is harsh, oppressive or unfair. The Commissioner of Police's power of removal under s 8 can only be exercised, when the Commissioner of Police loses confidence in a police officer's suitability to continue as a member of the Police Force, on the grounds specified in s 33L(1).
- 124 Ms Moran made a number of submissions in relation to s 8. At a broad level, Ms Moran contended that s 8 and the corresponding provisions of Part IIB should never be used for the removal of a sick or injured police officer who has suffered sickness and injury as a result of their duties. It was contended, in reliance on principles of ethics and morality, that the law as made by the Parliament of this State, on behalf of the citizens of the State, must be morally and ethically sound. No court or tribunal should uphold a law that fails to meet basic standards of ethics and morality. In the case of s 8, Ms Moran put it this way in her submissions:
- The use of section 8 reflects the separation from the morality of that of our citizens. It lacks morality and it harms the public interest and the destructive, serious harm suffered by the sick and injured constables, such as the appellant, who are victims of this appalling use of section 8 provide evidence of the immoral law. The majority of the general citizenry would be horrified at the circumstances surrounding this claim by the appellant. However, in their widespread ignorance the general citizenry are unaware of this lack of morality and ethics and - perpetrated in their name. In this case the appellant who has suffered in her service the people of Western Australia.
- There are three elements to this lack of morality and ethics perpetrated on the appellant under section 8. The first law, as defined, is intended to at the fundamental level, reflect and enforce the moral and ethical standards of a civilised society; in this case the citizens of Western Australia. The removal of the appellant from her employment under section 8 which places it in the company of villains and rogues and vagabonds, be they criminals, corruptors or abusers of their office is morally reprehensible and ethically wrong. West Australians live in a moralless society and expect their law to reflect their moral standards; one of which is to look after fellow citizens when they're subject to illness or injury caused by their employment.
- The payment of 28 days wages to assist the appellant to readjust to society and her removal does - does not reflect our society's morals and ethical standards and there is no indication of Government honesty in addressing this immoral situation. The immoral behaviour by all our - by all our Governments by their deliberate actions to ensure the lack of protection of removed constables, as the appellant, loom large when a Bill proposed to protect an injured constable, but was then denied progress in the parliament and lapsed because of want of support. The Bill was number 159; Police Compensation for Injured Officers Amendment Bill 2006 and it was proposed by Mr Cowper MLA in the State Parliament of Western Australia in 2006 and without support the Bill lapsed on 8 July 2008.
- 125 Ms Moran contended that the primary purpose of s 8 and the relevant provisions of Part IIB are to give the Commissioner of Police the capacity to remove corrupt and unsuitable persons as police officers from the Police Force, as a management tool. The reference was made by Ms Moran to the Kennedy Royal Commission into corruption into the Western Australian Police Force. Ms Moran contended that the Royal Commission, which reported in 2004, observed that provisions such as s 8 of the Police Act should never be used to remove sick and injured Police officers from the Police Force. Ms Moran submitted that it was morally and ethically "bankrupt" for the Commissioner of Police to remove Ms Moran from the Police Force, because of a

duty-caused injury, after 24 years of loyal and exemplary service, in accordance with her oath of office, protecting the citizens of this State, with nothing more than a 28 day maintenance payment on her removal.

- 126 Ms Moran further contended that the amendments to s 8 in 2003, by the introduction of the loss of confidence removal process, was being used by the Commissioner of Police to remove sick and injured Officers and was an abuse of law, because its objective is to get rid of sick and injured Police officers as cheaply as possible. Ms Moran also submitted that the Commissioner of Police failed to properly have regard to the matters raised by Ms Moran in her response to the NOITR and was dismissive of the issues raised by her. Ms Moran submitted that:

The amendment of 2003 contained the Police Act 1892 and associated Regulations are therefore an abuse of the fair process as the removed constables are denied legal assistance. And if suffering from PTSD, they are most unlikely to appeal. Not because they feel they shouldn't, but simply they've had the stuffing knocked out of them and they lack the capacity to fight. The appellant nonetheless is intent on presenting matters to the full extent, thereby reversing this likely of retreat by her, therefore I argue section 8 and associated parts of sections of the Police Act 1892 and related sections of the Police Regulations is a process that is abusive in law and it's process an abuse of the appellant.

- 127 And further, Ms Moran submitted:

The process of the law enacted leading to the autocratic decision by the respondent to declare, "I no longer have faith in the appellant to carry out her duties," and then with a contemptuous consideration of her appeal to him under the Police Act, the appellant was provided with no reply to the various matters contained in her appeal, but simply with the disdainful advice that her removal was not accepted - her appeal was not accepted and the process of her removal continued. And I'll relate to that further on.

- 128 On her removal from the Police Force, Ms Moran submitted that she received no acknowledgment of her 24 years of loyal and exemplary service to the State. This further diminished her dignity. Ms Moran contended that her removal under or through the s 8 loss of confidence process led to her feeling ashamed. Ms Moran's submission also was that not only has she suffered the indignity of the s 8 process, but also has lost her police career, through no fault of her own, because of an injury caused by her duty. She has also forgone some \$1.3 million in future income and superannuation payments as a consequence.

- 129 For the Commissioner of Police, it was contended that s 8 and Part IIB of the Police Act encompass a removal by the Commissioner of Police on the grounds of medical retirement. The submission was that the reference to "performance" in s 33L(1) of the Police Act, in relation to the Commissioner of Police's loss of confidence, encompasses the inability of a Police officer to perform their duties, for medical reasons. This is not a matter connected in any way with the integrity of the Police officer.

- 130 As to the argument put by Ms Moran to the effect that s 11 of the Police Act should be used in cases of medical retirement of Police officers, the Commissioner of Police referred to observations of the Commission made during the course of the hearing, that if so, then no right of appeal from a removal under s 11 exists. Thus, a Police officer may be worse off than the use of the s 8 procedure.

- 131 For the following reasons, in my opinion, s 8 and the corresponding provisions of Part IIB of the Police Act in this jurisdiction, encompass the removal of a Police officer on the ground of medical retirement.

- 132 In statutory interpretation, the starting point is to consider the language of the statute in its ordinary and natural sense: *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited* (1920) 28 CLR 129 at 161-2. A provision in an Act must be construed in the context of the statute as a whole. At first blush, the terms of s 33L appear to be broad. If the Commissioner of Police does not have confidence in a member's suitability to continue as a member, having regard to the member's... performance...", the Commissioner of Police may provide a written notice. The Macquarie Dictionary defines "performance" as "execution or doing, as of work, acts or feats", "a particular action, deed, or proceeding", "the act of performing" and "the way in which something reacts under certain conditions or fulfils the purpose for which it was intended": *The Macquarie Dictionary Online* (at 22 May 2015). The "Golden Rule" of statutory interpretation contemplates the modification of the literal meaning of the words used to overcome an error or defect perceived in the text: Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (8th ed, 2014) 36-37.

- 133 Given it is not clear how wide the word "performance" is, it is useful to apply the contextual and purposive approaches to interpretation, which I outline below.

- 134 A starting point will always be a consideration of the ambiguous word in the context of the legislation as a whole. This involves considering the immediate context, such as the words of the section, the heading to Parts and Divisions and other nearby provisions, as well as the overall context such as the purpose clause, preamble, and where the section is located in the legislation.

- 135 Section 33L is about the Commissioner of Police losing confidence in a member's suitability to continue. Section 33L is contained in Div 2 in Part IIB of the Police Act. Division 2 is concerned with removal of members, and s 33L has the heading "Notice of loss of confidence to be given before removal action is taken". This means that a notice is a preliminary step before removal action is taken. I note that the short title of the Police Amendment Act, which introduced Part IIB, states it is "to provide a procedure for removing members of the Police Force and for dealing with appeals in relation to those removals".

- 136 A notice of loss of confidence may be given if the Commissioner of Police does not have confidence in the Officer's suitability to continue as a member, having regard to their performance: s 33L. "Having regard to" means that the Commissioner of Police must take into account "the member's...performance" when making the decision as to whether he does not have confidence in the member's suitability to continue, and give weight to "performance" as a fundamental element in making the decision. The weight to be given to "performance" is for the Commissioner of Police to determine, provided that the consideration of the matter is genuine. It provides discretion to the Commissioner of Police to weigh the significance of the performance issue: Pearce DC and Geddes RS, *Statutory Interpretation in Australia* (6th ed, 2006) 364-365.

- 137 I note that “confidence” is defined by the Macquarie Dictionary as “full trust; belief in the trustworthiness or reliability of a person”, “certitude or assured expectation” and “self-reliance, assurance, or boldness”. The apostrophe in “member’s suitability” means the member has to possess suitability. This must be construed to mean possessing suitability at the time of consideration by the Commissioner of Police of the Officer’s proposed removal under s 8. I do not consider that this section extends to the circumstance where an Officer may not then be suitable, but may be suitable at some time in the future.
- 138 The words “...having regard to the member’s integrity, honesty, competence, performance or conduct” appear throughout the Police Act in relation to the loss of confidence proceedings. On receipt of a notice, s 33L(2) allows a member to make a submission to the Commissioner of Police in respect of the grounds of the loss of confidence in the member’s suitability to continue. Following that period, the Commissioner of Police will then decide whether or not to take removal action. The Commissioner of Police can only decide to take removal action if he has taken into account the member’s written submissions and “still does not have confidence in the member’s suitability to continue as a member, having regard to the member’s performance...”
- 139 The power of removal in s 8(1) can only be exercised if the Commissioner of Police has complied with s 33L and removal action has not been revoked under s 33N. Section 8 provides that a Police officer may be removed, and upon any vacancy by “removal, disability, or otherwise...” some other fit person can fill the position. This section interacts and relates to s 33L, and refers to fitness and the creation of vacancies due to removal on the grounds of disability.
- 140 In determining this appeal, the Commission is to have regard to, among other factors, the public interest which is taken to include “the importance of maintaining public confidence in the integrity, honesty, conduct and standard of performance of members of the Police Force”: s 33Q(4)(b)(i).
- 141 It is important to understand the purpose behind the legislation to interpret the word “performance” in s 33L. It is the objective intention of Parliament in passing the legislation that concerns the Commission: Hall K, *Legislation* (2002) 86. The purposive approach involves preferring the construction that would promote the purpose of the legislation in all stages of the process of interpretation: Hall K, at 79; see Pearce DC & Geddes RS 8th ed at 38. Section 18 of the Interpretation Act 1984 provides that:

18. Purpose or object of written law, use of in interpretation

In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object.

- 142 This means that the Commission is required to prefer an interpretation of legislation that promotes the object over one that does not. The purposive approach requires looking at what the clause is intended to do, the preamble, the definition sections, and extrinsic material such as reports of Royal Commissions or Law Reform Commissions, committees of inquiry, any treaty or other international agreement that is referred to in the Act, any explanatory memorandum relating to the Bill containing a provision, and Second Reading Speeches made to a House of the Parliament by a Minister: The Honourable Justice S Crennan, ‘Statutes and the contemporary search for meaning’ (Paper presented at the Statute Law Society, London, 1 February 2010). (See too: Pearce DC & Geddes RS, 8th ed at 90, 99 and 116).
- 143 The use of extrinsic material in interpretation is dealt with in s 19 of the Interpretation Act 1984. Extrinsic evidence can be used to confirm the ordinary meaning of words; determine the meaning of the provision if it is ambiguous or obscure; or if the ordinary meaning leads to a result that is manifestly absurd or is unreasonable.
- 144 Importantly, the Explanatory Memorandum in relation to the Police Amendment Bill 2002 at cl 6 provided that s 33L:

Sets out the procedure to be followed to remove a member where the Commissioner does not have confidence in the member’s suitability to continue as a member having regard to the member’s integrity, honesty, competence, performance or conduct. They are **sufficiently broad** to ensure that the Commissioner retains a **wide managerial discretion** to cause members to be removed where their suitability is in question. **They are also broad enough to ensure the Commissioner is able to remove a member who is medically unfit to continue performing the duties of a member.**

(My emphasis)

- 145 This is highly relevant to the present discussion as to whether ss 8 and 33L are broad enough to encompass the removal of an Officer on medical retirement grounds. The observations quoted above are entirely consistent with the continued application of s 8 and the process introduced by Part IIB to a circumstance of removal on the grounds that a Police officer has been declared medically unfit for duty.
- 146 The Explanatory Memorandum further provides that s 8:
- Amends the power to remove members of the police force under section 8 of the Act by introducing a requirement to the effect that before a member can be removed from office under section 8 the Commissioner must have lost confidence in the member’s suitability to continue as a member having regard to the member’s integrity, honesty, competence, performance or conduct. Procedures for the removal are set out in section 33L, introduced by clause 6 of the Bill.
- ...
- The ability to dismiss or discharge a member following conviction of a disciplinary offence under s23 of the Police Act 1892 remains unaffected.
- 147 The various Parliamentary debates in relation to the Police Amendment Act refer to the intended breadth of the loss of confidence removal provisions and that they were intended to confer on the Commissioner of Police a managerial tool. The loss of confidence provisions were not intended to be used for determining guilt or to punish officers.
- 148 Section 19(2) of the Interpretation Act 1984 provides that reports of Royal Commissions that are laid before either House of Parliament before the time when the provision was enacted may be considered in interpreting a provision. In this respect, Ms Moran submitted that the “Report on Part II B of the Police Act 1892 pursuant to the review conducted under s 33Z of the Act” was the result of the Kennedy Royal Commission. However, not only did the Kennedy Royal Commission report in

January 2004, after the Police Amendment Act took effect, but also the Royal Commission Report did not make any specific recommendations in relation to the operation and effect of s 8 and Part IIB of the Police Act. Thus, the Royal Commission Report is not relevant in determining the scope and purpose of s 8 and Part IIB.

- 149 As to the Report under s 33Z of the Police Act, published on 24 February 2006, whilst some views were expressed about the suitability of the use of s 8 and Part IIB in cases of Officers incapacitated through injury, these matters are appropriate for consideration of future amendments to the Police Act, and are not relevant to its interpretation.
- 150 Additionally, by Part VIA of the Regulations, regs 6A01 to 6A10 deal with the procedure to apply when a “complaint or other information is received by the Commissioner or the Assistant Commissioner concerning a member’s integrity, honesty, competence, performance or conduct”. A review officer is to be appointed to undertake an inquiry and to report to the Commissioner of Police. Notably, by reg 6A05, apart from the requirements of s 33L of the Police Act, where a NOITR is to be issued by the Commissioner of Police, it is to set out the “particular conduct or behaviour on which the Commissioner’s loss of confidence is based”.
- 151 Under reg 6A11, regs 6A02 to 6A08 do not apply where removal action is to be taken by reason of a medical board report that a Police officer is no longer fit for active service. In my view, this provision clearly indicates the intended application of s 8 and Part IIB of the Police Act to medical retirements, having regard to the plain meaning of “disability” in s 8. Also however, a clear distinction is drawn between those Officers who have committed an act of misconduct or engaged in poor behaviour, as set out in reg 6A05, and those to be medically retired, as contemplated by reg 6A11. That is, the Regulations themselves draw a distinction between those subject to removal for cause based on conduct and behaviour, and those subject to removal for reasons beyond their control in the case of incapacity through injury.
- 152 Having regard to the foregoing, I do not consider that it was the Parliament’s intention to narrow the meaning of “performance” in s 33L. This is not a situation where “performance” should be read down to give effect to Parliamentary intention: *R v Young* (1999) 46 NSWLR 681 at 687-8. Thus, I do not consider that it can be contended that the removal of a Police officer on medical retirement grounds under s 8 and Part IIB of the Police Act, assuming that the procedure for removal has been complied with by the Commissioner of Police, could be considered unlawful. Further, whilst I fully appreciate Ms Moran’s sense of grievance in the use by the Commissioner of Police of s 8 and Part IIB of the Police Act in her circumstances, given that it is the duty of the Commission to interpret and apply the legislation as made by the Parliament of the State, it is not open for the Commission to decline to do so, or to do so inconsistent with the Parliament’s evident intention, on the grounds that the legislation is said to be lacking in ethics or morality. That issue, if relevant, is ultimately for the Parliament to resolve.
- 153 Finally, as noted above, Ms Moran made a number of submissions about the scope of s 11 of the Police Act, to the effect that this provision should have been used instead in the case of the medical retirement of Police officers. We did not receive the benefit of comprehensive submissions on the point. As already mentioned, if s 11 was available to be used by the Commissioner of Police, then arguably Ms Moran would be worse off because no statutory right of appeal appears to be available from removal under s 11. Further, there is no provision for any maintenance or other payments to be made to a Police officer removed under this provision. However, it is unnecessary to take this matter any further in terms of the present appeal.

Consideration on the merits

- 154 There is little or no dispute as to the facts in this matter. Ms Moran was appointed as a Constable and took her oath of office on 23 July 1990. She worked as a Police officer in various locations throughout the State including the Perth metropolitan area. Ms Moran also was based in Newman in the northwest of the State, and Geraldton, where she spent the last 10 years of her career with the Police Force.
- 155 In 2007 Ms Moran took leave without pay for 12 months. This was described in her witness statement as a period needed to have a break from policing, in particular following the death of a colleague in Geraldton. On her return to work Ms Moran described some of the situations that she had to contend with in front line policing and the stresses that this caused her. This included regularly dealing with violent offenders, domestic incidents, deaths and other stressful incidents. Ms Moran narrated how, with the passage of time and the accumulation of stresses resulting from this work, that she suffered an effective breakdown, leading to her leaving the Geraldton Police Station on or about 10 December 2012 and going on sick leave. Ms Moran did not return to work.
- 156 Ms Moran described in some detail, the physical and emotional symptoms she experienced up to that time, and the problems it caused to her family and social relationships. She says she now recognises that she was suffering, and continues to suffer, the effects of PTSD. Ms Moran described that since ceasing working as a Police officer, she has been on prescribed anti-depressant medication and although her outward appearance seems normal, she describes herself as still in an emotionally fragile state and suffers anxiety from pressures of life.
- 157 Whilst pursuing her recovery, Ms Moran said that the fact that she is no longer policing has helped her in this regard.
- 158 On the Commissioner of Police’s sick leave system, Health and Welfare Services are notified if an Officer reaches a threshold of 80 hours continuous sick leave. Ms Moran had reached this threshold by about 18 December 2012. The first contact from Health and Welfare Services to Ms Moran appears to have been on 18 December. The contact records kept by Health and Welfare Services were contained at pp 57-66 of the Commissioner of Police’s book of documents tendered as exhibit A. On 30 January 2013 Ms Moran informed Health and Welfare Services that she was under the care of her GP and the note reflects that the Health and Welfare Services’ role was explained to her. Ms Moran was to consider the use of the services. Later, on 14 February 2013, Ms Moran’s case was referred to Ms Giannini, a Vocational Rehabilitation Consultant in Health and Welfare Services. Ms Giannini, in her evidence, described her role as involving the case management of ill or injured Police officers and staff. Part of her responsibilities is to assist in the return to work of Officers and staff.

- 159 On 26 February 2013, the record reflects that Ms Moran notified Health and Welfare Services that she was to be on indefinite sick leave from that time. Furthermore, the record reflects a notation that Ms Moran would not welcome contact from her workplace at that time.
- 160 Ms Giannini referred to a conversation she had with Ms Moran on 28 February 2013. Ms Moran's note of the same conversation is at exhibit A at p 60. Ms Giannini said that she spoke to Ms Moran on this occasion to introduce herself and to explain her role. Ms Moran informed Ms Giannini that she had been diagnosed with depression and was scheduled to see a psychiatrist, Dr Loke, in March. Ms Moran told Ms Giannini of her medication. Ms Giannini noted that Ms Moran told her of her break from service in 2007 and that she had reached a "bad state" by December 2012, but prior to this, was fully operational. Ms Giannini testified that Ms Moran then told her in words to the effect "she had serious doubts about her ability to return to work at all and would consider medical retirement".
- 161 According to Ms Giannini, she regarded the comment from Ms Moran about possible medical retirement as unusual, at such an early stage. Ms Giannini said she informed Ms Moran that she first needed to undergo treatment and her condition needed to be stabilised. The comment from Ms Moran as to medical retirement was the only factual issue in dispute. According to Ms Moran, she informed Ms Giannini in the conversation on 28 February that she did not wish to return to work "to get sick again". A note of a conversation to this effect was at exhibit 2. Ms Moran testified that it was Ms Giannini and not her, who made a reference to possible medical retirement.
- 162 On 27 March 2013 further contact was made by Ms Giannini with Ms Moran. Ms Moran's note of this conversation appears at p 60 of exhibit A. In it, it is recorded that Ms Moran had told Ms Giannini that she had been told by both her GP and her treating psychiatrist, that they considered Ms Moran was not able to return to work "in the foreseeable future" and she should be medically retired. The note further records a comment from Ms Moran to the effect that she feels no longer able to work effectively as a Police officer. At that stage also, Ms Moran was to provide Health and Welfare Services with a written consent to obtain her medical records from her treating doctors and Ms Moran also agreed to see the Commissioner of Police's psychiatrist, Dr Piirto.
- 163 Subsequently, on 21 June 2013, Dr Piirto reported on her assessment of Ms Moran. A copy of Dr Piirto's medical report was at pp 30-33 of exhibit A. Dr Piirto diagnosed Ms Moran with PTSD (chronic) and Major Depressive Disorder (chronic and in partial remission). In her report, Dr Piirto concluded that Ms Moran showed some improvement with treatment and also based on a realisation that Ms Moran would not be returning to duty as a police officer. Dr Piirto also noted that Ms Moran recognised triggers to her decline in mental health as a consequence of exposure to work as a police officer, and that further exposure to such stressors or triggers would only exacerbate her mental health deterioration. Dr Piirto also observed that "Senior Constable Moran is not motivated to consider engaging in any other role with WA Police. She has appropriate support from her GP and family members, as well as friends, in her decision". Finally, Dr Piirto concluded that further treatment for Ms Moran, would not lead to her regaining capacity to work as a police officer.
- 164 A medical opinion was also sought and obtained from Dr Loke on 24 July 2013. In his report, contained at pp 34-38 of exhibit A, Dr Loke concluded that Ms Moran was not able to go back to work as a police officer or be rehabilitated. Dr Loke further concluded that Ms Moran may be able to undertake training for a different occupation other than policing, in the future. Ms Moran's General Practitioner, Dr Buckley, also expressed the opinion on 30 July 2013 that Ms Moran was not able to ever return to work as a police officer (see p 39 exhibit A).
- 165 In January 2014, the Commissioner of Police requested that a medical board be convened under reg 1402(1) of the Regulations 1979. The letter from the Assistant Director Human Resources of WA Police, Ms Donaldson, requested that the medical board's opinion be obtained as to whether Ms Moran was fit to undertake further active duties as a police officer. A list of the main duties of a police officer was set out in the letter.
- 166 In response to the request, a medical board was convened on 11 March 2014. The medical board, comprising three medical practitioners, concluded that Ms Moran was not fit to return to work for the WA Police (see p 14 exhibit A). The medical board concluded that:
- Since leaving work she has improved but still becomes anxious and defensive when she has contact with her former employment. We feel if Susan attempted to return to the (sic) work for Western Australia Police it would heighten her emotional problems in spite of therapy.
- Thus we feel Susan Moran is unfit for work within Western Australia Police however with time she should be able to cope in a non confronting environment working for another employer.
- 167 As noted above, Ms Moran did not dispute the opinions expressed by her treating doctors. Ms Moran also did not dispute the conclusions reached by the medical board. However, I note that at the medical board hearing on 11 March 2014, Ms Moran provided a "Notice of Intent" that she intended to challenge her removal from the Police Force, under Part IIB. A copy of Ms Moran's notice was at p 15 of exhibit A. As a consequence of the medical board finding, Ms Moran was served on 3 April 2014, with a NOITR under s 33L(1) of the Police Act, on medical grounds. The Commissioner of Police expressed the view that "I am not satisfied that you are able to continue to perform the duties of a police officer due to your Post Traumatic Stress Disorder and Major Depressive Disorder" (see p 51 exhibit A). On 22 April 2014, within the 21 day period allowed by the Police Act, Ms Moran responded to the Commissioner of Police (see pp 16-23 exhibit A).
- 168 Despite the matters raised in Ms Moran's reply to the NOITR, which largely reflect matters raised by her in these proceedings, the Commissioner of Police still maintained his view of a loss of confidence in Ms Moran's ability to continue as a member of the Police Force, on the grounds of her PTSD and Major Depressive Disorder. The Commissioner of Police then made a recommendation to the Minister for Police, for the removal of Ms Moran on medical grounds and Ms Moran was removed from the Police Force on 17 July 2014 (see pp 52-55 exhibit A).

- 169 On her removal, Ms Moran was paid a 28 day maintenance payment under s 33M of the Police Act in the sum of \$5,253 and \$36,887 in accrued leave entitlements. In the course of Ms Moran's extended sick leave, from 18 January 2013 to 17 July 2014, Ms Moran was paid some \$100,828. Ms Moran was paid \$1,500 for her medical expenses under the Western Australia Police Officers Industrial Agreement and reg 1306 of the Regulations. Any of Ms Moran's work related medical expenses post her removal, are paid under the Police (Medical and Other Expenses for Former Officers) Act 2008. Additionally, as a result of her disability, Ms Moran received some \$200,000 from her superannuation fund. The effect of the Police (Medical and Other Expenses for Former Officers) Act is to treat former police officers injured in the course of duty, the same as any other employee injured at work and the terms of the Workers' Compensation and Injury Management Act 1981, has application.
- 170 A principal contention of Ms Moran was that the Commissioner of Police breached his duty of care towards her in that he failed to take appropriate steps to prevent Ms Moran's psychiatric injury. Additionally, Ms Moran contended that the Commissioner of Police breached his duty of care to Ms Moran, by discarding her after 22 years of meritorious service, with nothing more than a 28 day maintenance payment, under s 33M of the Police Act. Part of this alleged breach of duty, was said by Ms Moran to be the Commissioner of Police's failure, after Ms Moran's period of leave without pay in 2007, to properly be alert to problems experienced by Ms Moran and to put in place steps to assist her.
- 171 Ms Moran referred to a considerable body of material in her submissions on the issue of occupational health and safety risks associated with work as a police officer. It was also submitted by Ms Moran that a simple "checklist" for PTSD, used in the military, was available and could have been used by the Commissioner of Police to assist in detecting early signs of PTSD in police officers. Ms Moran also referred extensively to various annual reports from the WA Police, and submitted that the statements by the Commissioner of Police about duty of care and health and safety matters, have not translated into concrete action to help police officers. It was contended that there is no reference in these annual reports to PTSD, despite the existence of the condition being raised by the Western Australian Police Union of Workers in the past. A number of other submissions were made to the effect that the Commissioner of Police had neglected his duty of care towards Ms Moran.
- 172 The Commissioner of Police accepted for present purposes that he had a duty of care towards Ms Moran, under s 19 of the Occupational Safety and Health Act 1984, which by s 3(4) extends to police officers, as if they were employees and the Crown is treated as if it was the employer of police officers. However, in further written submissions filed on 17 April 2015, the Commissioner of Police submitted that Ms Moran's submissions in relation to the alleged breach of a duty of care were beyond the scope of the present appeal. The Commissioner of Police contended that an allegation of a breach of the Commissioner of Police's duty of care to Ms Moran was not raised by Ms Moran in her grounds of appeal. It was contended by the Commissioner of Police that if the issue was fairly and squarely raised by Ms Moran in her grounds of appeal, the Commissioner of Police would have put on evidence in response, to demonstrate the steps taken by the Commissioner of Police to mitigate the risks of Ms Moran's injury and the assistance provided to Ms Moran in response to her injury.
- 173 On the other hand, in response, Ms Moran in further written submissions in reply, submitted that based on all of the material before the Commission, it was open for the Commission to determine that the Commissioner of Police did breach his duty of care towards Ms Moran and this breach may contribute to a finding by the Commission that the removal of Ms Moran was harsh, oppressive or unfair.
- 174 I am prepared to accept that a demonstrated breach by an employer of its duty of care to an employee, may, depending on the circumstances, contribute to a finding that a dismissal is harsh, oppressive or unfair. In circumstances where it is established that an employer was on clear notice of a possible occupational health and safety risk to an employee, the employer failed to take notice of it and the dismissal of the employee arose in part or in whole from such a breach, then those circumstances would be circumstances that could be taken into account in determining if overall, a dismissal was unfair.
- 175 However in this case, I agree with the Commissioner of Police's submissions that the grounds of appeal do not put the allegation of a breach of duty of care clearly in issue. It is the grounds of appeal in s 33P of the Police Act that mark out the scope of the issues to be determined by the Commission under s 33Q of the Police Act. It is the grounds of appeal that must specify the reasons that the Commissioner of Police's decision to remove a police officer is harsh, oppressive or unfair. Accordingly, it was necessary for Ms Moran to articulate her grounds of appeal in such a way, that the Commissioner of Police was on notice from the beginning of the case that it had to meet on the appeal.
- 176 Not only does s 33P(2)(a) require an appellant to specify the reasons a decision by the Commissioner of Police to remove a police officer is harsh, oppressive or unfair, but by reg 91(1)(a)(i)-(iv) of the *Industrial Relations Commission Regulations 2005*, the Commissioner of Police must respond to the notice of appeal, specifying the reasons for the removal action and a reply, containing matters the Commissioner of Police wishes to raise in relation to an appellant's case, is to be made.
- 177 From the grounds of appeal, set out earlier in these reasons, it is not stated that the Commissioner of Police was in breach of his duty of care to Ms Moran. Whilst Ms Moran referred to submissions about such allegations being contained in subsequent documents provided by her to the Commissioner of Police, it is the grounds of appeal which are most important in this respect. It is the grounds of appeal that the Commission must consider when determining what is to be determined. It is not enough to seek to infer a ground from the grounds as filed. A clear statement by Ms Moran as to an alleged breach of a duty of care by the Commissioner of Police would have put the Commissioner of Police on notice to incorporate in his answer and reply, and in his case on the appeal, the matters referred to by the Commissioner of Police in its reply submissions mentioned above.
- 178 The fact that the grounds of appeal have not clearly raised the issue of a breach of duty of care, puts the Commissioner of Police in the position of not being on notice to make submissions and lead evidence about procedures that the WA Police has in place and what steps it took to assist Ms Moran in the present matter. Therefore, in my view, the allegations of a breach of a duty of care are not able to be taken into account by the Commission on this appeal.

- 179 Having concluded earlier that there is no barrier to the Commissioner of Police in using s 8 and Part IIB of the Police Act to remove police officers on medical retirement grounds, the issue then becomes whether, Ms Moran's removal, having regard to all of the circumstances of the case, was harsh, oppressive or unfair.
- 180 The relevant principles applicable to appeals of the present kind are not contentious. It is accepted that a removal of a police officer under s 8 and Part IIB of the Police Act involves the exercise of managerial discretion by the Commissioner of Police. The purpose of a s 8 removal of an Officer is not in any sense a punishment but a means by which the confidence of the Commissioner of Police in a police officer's suitability to remain in the Police Force can be maintained. The overall test to apply is whether, having regard to the circumstances, the police officer has been denied a "fair go all round" or whether the Commissioner of Police's right to remove was exercised in such a way as to constitute an abuse of that right: *Carlyon v Commissioner of Police* (2005) 85 WAIG 708; *The Undercliffe Nursing Home v The Federated Miscellaneous Workers' Union of Australia, Hospital, Service and Miscellaneous, WA Branch* (1985) 65 WAIG 385; *In re Loty and Holloway v Australian Workers' Union* (1971) 71 AR 95. Of course, these principles, applicable to unfair dismissal cases generally, must be considered and applied in the context of the specific statutory provisions of Part IIB of the Police Act, in particular s 33Q(4).
- 181 Additionally, as has been repeatedly observed by the Commission in unfair dismissal cases the role of the Commission is to not place itself in the managerial chair of the Commissioner of Police. Rather, it is for the Commission to consider objectively, whether the recommendation of the Commissioner of Police to the Minister of Police, to remove Ms Moran, was, in all of the circumstances, harsh and unfair.
- 182 The starting point for the purposes of considering Ms Moran's challenge to her removal, in accordance with s 33Q of the Police Act, is the reformulated reasons of the Commissioner of Police, filed on 6 February 2015, following the admission of new evidence from Ms Moran. The proceedings dealing with Ms Moran's request for the admission of new evidence under s 33R were dealt with at an earlier stage in this appeal: *Moran v The Commissioner of Police* (2015) 95 WAIG 185.
- 183 The reformulated reasons of the Commissioner of Police refer to the medical board's opinion that Ms Moran was no longer fit to work with the WA Police. Based on that opinion, due to Ms Moran's PTSD and Major Depressive Disorder, the Commissioner of Police was not satisfied that Ms Moran was able to continue to perform her duties as a police officer. The Commissioner of Police referred to Ms Moran's response to the NOITR and that Ms Moran did not dispute that she was no longer fit to work as a police officer. I accept this to be the case. Whilst Ms Moran raised a number of issues in her "Notice of Appeal", delivered to the Commissioner of Police on 22 April 2014, it did not raise any issue with her medical prognosis.
- 184 I also note that there was nothing in Ms Moran's response to suggest that she was motivated to return to the Police Force in another identifiable capacity or that with further treatment, she could do so. Rather, Ms Moran requested that she be retained in the Police Force at her current salary until a workers' compensation scheme for police officers can be resolved and that Ms Moran be offered an ex-gratia payment equal to five years' pay. Having considered Ms Moran's response, the Commissioner of Police maintained the view that Ms Moran was still not able to perform the duties of a police officer by reason of her illness.
- 185 The Commissioner of Police then considered the content of the new evidence tendered by Ms Moran and formed the opinion that nothing in it demonstrated to the Commissioner of Police that Ms Moran was fit to perform the duties of a police officer. The Commissioner of Police maintains in the reformulated reasons, that there is no obligation on him to indefinitely retain a police officer, who is no longer fit to perform the duties of a police officer. At the time of the reformulated reasons, the Commissioner of Police remained of the view that Ms Moran was unfit to perform the duties of a police officer and there was no reasonable prospect of Ms Moran regaining her fitness for duty.
- 186 The reasons of the Commissioner of Police go on to refer to Ms Moran's allegation of the unfairness of the compensation paid to her and refers to the fact that that compensation is set by the Parliament in s 33M of the Police Act. The Commissioner of Police also notes that a unique scheme of compensation applies to police officers in this State, not available to other employees. While no workers' compensation scheme presently exists for police officers, they are entitled to 168 days of sick leave per year; the payment of all non-work and work-related medical expenses and all work related medical expenses after a police officer leaves the Police Force.
- 187 The Commissioner of Police also stated that Ms Moran has been provided the same entitlements as all other medically retired police officers. In this regard, the Commissioner of Police said that as in Ms Moran's case, once a medical board has deemed an Officer is no longer fit to perform the duties of a police officer, and he is satisfied to this effect also, it is his practice to retire the Officer on medical grounds. Ms Moran was treated in the same way as all others retired on medical grounds.
- 188 As part of the new evidence tendered, Ms Moran referred to the circumstances of another current police officer, as contained in a copy of an article in "The West Australian" of 20 November 2014. The Commissioner of Police stated that in this Officer's case, although he has been retained in the Police Force, pending the outcome of his ex-gratia payment request to the State Government, his injuries are catastrophic and he is unable to walk or talk, as a consequence of a mosquito virus he contracted while a police officer. He will not be able to work again, in any capacity. On this basis, the Commissioner of Police explained that this Officer's situation is exceptional, and very different to that of Ms Moran.
- 189 Reference was also made to the situation of another former police officer who was medically retired in 1996. The Officer received an ex-gratia payment from the State Government in 2012. The Commissioner of Police noted however, that this former Officer was medically retired well prior to the ex-gratia payment being made to him and that the medical retirement process for Ms Moran, was no different. The Commissioner of Police also contended that it is open to Ms Moran to seek an ex-gratia payment from the State, if she wished to do so.
- 190 Finally, in terms of the new evidence, the Commissioner of Police referred to an article recently reported in the "WA Police News" about the process for the removal of medically unfit Officers, in which the Police Minister was quoted as saying "I believe we can do that better ...". The Commissioner of Police submitted that this statement was made in a political context and was not a matter that he could take into account.

- 191 In summary, the Commissioner of Police in his reasons said that he was bound by the processes of the Police Act and the Regulations. Once a medical board has reported to him that a police officer is not fit for active service, then subject to the Police Act, he is required under reg 1402, to inform the Officer when they will cease duty. The Commissioner of Police contended that s 8 as amended in 2003, with the addition of Part IIB, is the only mechanism available to him to remove a police officer from the Police Force. For the reasons I have expressed above, I agree with that view.
- 192 Based on the foregoing and the terms of the Police Act, the Commissioner of Police said that where he has lost confidence based on medical grounds, in order to maintain the public confidence in the Police Force, he has a duty to remove a police officer under s 8 and it is not in the public interest to retain on paid sick leave, for an indeterminate time, police officers who are permanently unfit for duty.
- 193 Given the approach of the Commission to matters such as these, the question to be asked is whether, objectively considered, the decision by the Commissioner of Police to remove Ms Moran from the Police Force, was, having regard to all of the circumstances, one reasonably open to him and it was not otherwise an abuse of the Commissioner of Police's statutory power to remove a police officer under the Police Act. For the following reasons, whilst I have very considerable sympathy for the circumstances of Ms Moran, I consider that the decision taken by the Commissioner of Police was reasonably open. The decision does not constitute a harsh, oppressive or unfair removal of a police officer under the Police Act.
- 194 Whilst these proceedings concern the removal of police officers in a specific statutory context under the Police Act, some assistance can be obtained from cases in industry generally, where an employee loses their employment as a result of an injury or illness that renders them unfit for their duties. Some reference was made to this line of cases in another police appeal in *Jones v Commissioner of Police* (2007) 87 WAIG 1101, although the circumstances of that appeal are distinguishable from the present matter. I would observe however, that unlike employees in industry generally, police officers, as statutory office holders, have been held to have their appointments subject to similar principles applicable to those engaged under Crown prerogative: *Fletcher v Nott* (1938) 60 CLR 55; *Menner v Commissioner of Police* (1997) 74 IR 472 at 474-475 per Anderson J; cf: *Jarratt v Commissioner of Police* (2005) 224 CLR 44.
- 195 In *Jones*, the Commission found that the appellant, after 20 or so years as a police officer, was unfairly removed from the Police Force, partly because the Commissioner of Police found her to be refusing to return to work when of the opinion she could do so. The Commission went on to find that the appellant had not demonstrated that removal on medical grounds, based upon the Commissioner of Police's reformulated reasons, would be unfair, given that the appellant was not able to establish that she was fit to resume duty in the near future in that case. The cases referred to in *Jones* were a decision of the South Australian Industrial Relations Commission in *Kyriakopoulos v James Hardie & Company Proprietary Limited* (1970) 37 SAIR 91 and a decision of this Commission in *Batchelar v Skybus* (1983) 63 WAIG 2244.
- 196 *Kyriakopoulos* dealt with an unfair dismissal claim involving an employee dismissed when the evidence showed that the employee would have been fit to resume work after about two weeks on light duties. In *Batchelar*, in an unfair dismissal case, involving an injured employee, Fielding C adopted the approach of Olsson J in *Kyriakopoulos* and, at 2246, said:
- In the circumstances, I cannot see how it can be said that the Applicant was unfairly dismissed. There was, as I find, no useful work for her to perform. The medical evidence is that she cannot now perform the tasks for which she was once employed. I respectfully agree with the view expressed by Olsson P. in *Kyriakopoulos v. James Hardie and Co. Pty. Ltd* (*supra*), at page 103, that an applicant in a case of this nature "may only succeed if he is able to demonstrate that he is, or will in the reasonably near future on the balance of probabilities be able, adequately and fully, to discharge all of the duties of the former position with the employer". An employer is not obliged to keep the former position open indefinitely, but only for a reasonable time. In considering the question of fairness or otherwise of any dismissal which results in circumstances such as these, consideration should be given to the employee's past service record and the efforts made to rehabilitate after the injury. In that case, the medical evidence indicated that the employee after a period of two weeks' light duties would in all probability be fit to resume the tasks for which he was originally employed, but he was dismissed, and it was held to be unfairly so. Unlike the position in that case, the preponderance of medical evidence on this occasion does not suggest that in the foreseeable future the Applicant will be able to do that for which she was employed, namely drive buses. Indeed, the evidence is that she will not be so able to work. The position in this case is more akin to that examined in *Botterill v. James Hardie and Co. Pty. Ltd.* (1975) 42 S.A.I.R. 322, where an employee injured at work had been incapacitated for approximately seven months leading to another person being employed to perform his functions, the indications being that when he was fit for work it would be in some totally different capacity. Following the approach adopted in *Kyriakopoulos v. James Hardie and Co. Pty. Ltd.* (*supra*), the South Australian Commission refused to hold that the dismissal was unfair. In this case, more than six months elapsed between the Applicant's injury and her dismissal. The Respondent kept the Applicant's position vacant for as long as it could, but was finally forced to engage another driver to perform her functions. It might even be said that even if the Applicant was fit to drive, it was not unreasonable in those circumstances that she be dismissed now that someone else is performing her function. However, the Respondent did not simply adopt that attitude but sought to find alternative work which was within the Applicant's physical capability. I am satisfied that it did not have that work available, and for that reason dismissed the Applicant from its employ.
- 197 To the extent that the general approach in those cases was endorsed in *Jones*, I would similarly have regard to them in this appeal. I cannot accept the proposition that the Commissioner of Police should be required to maintain indefinitely in the Police Force, an Officer who has been found to be medically unfit for duty, has no reasonable prospect of any recovery and is either unable or unwilling to be rehabilitated into any other available position within the Force. To do so would be to disregard the public interest in s 33Q(4)(b). Such interests must however be balanced with Ms Moran's interests under s 33Q(4)(a).
- 198 As I have already mentioned, in this case the medical evidence, which was not contested, was overwhelmingly to the effect that Ms Moran, as a consequence of her condition, was not fit to return to work as a police officer and would not be able to do so in the future. There was no suggestion on the evidence that Ms Moran may be, with further treatment and rehabilitation,

able to resume work as a police officer. Indeed the expert opinion was quite the opposite. Any attempt to rehabilitate Ms Moran back into the Police Force, in any capacity, may have served to aggravate her medical condition and set back her recovery. This was the conclusion of the medical board convened by the Commissioner of Police to assess the medical fitness of Ms Moran.

- 199 Nor was the medical opinion, to the effect that Ms Moran was not motivated to consider a return to work in any other capacity, seriously challenged on the evidence. On the contrary, a close examination of Ms Moran's own evidence, as contained in her statement at exhibit 9, in particular at pp 7 and 9-10, tends to suggest any thought of an association by Ms Moran with the WA Police, provoked a strong negative response. This was also consistent with the conclusion reached by the medical board in its report.
- 200 In this context, which in my view is most important, the submission of Ms Moran that options of other positions in the Police Force, to those of front line policing duties as a police officer, were not explored in detail, which means the removal of Ms Moran must be unfair, cannot succeed. When confronted with all of the medical evidence, including that of Ms Moran's own treating specialist, combined with the medical board conclusions in its report, it is difficult to see how the Commissioner of Police could come to any other conclusion. In this context also, is the fact that Ms Moran did have a one year absence from work on leave without pay in 2007, and a further one and half years of paid sick leave from the beginning of 2013 to mid-2014. All of Ms Moran's medical expenses were paid and will continue to be paid in the future.
- 201 As mentioned earlier, the only real factual issue in dispute was whether it was Ms Moran or Ms Giannini who first raised the medical retirement option very early on in February 2013. However, this is not, at the end of the day, decisive in any material sense. The fact remains that the medical opinion before the Commissioner of Police and before us on this appeal, is conclusive.
- 202 It is also of some note in this case, that by reg 1402(4) of the Regulations, once the Commissioner of Police is informed by a medical board convened under reg 1402(1) that a police officer is unfit for further active service, "the Commissioner shall advise the member of the date the member will cease duty". The terms of reg 1402(4) commence with the words "Subject to this Act". It seems to me that taken in context, this reference is for the purposes of having regard to the removal and the appeal from removal provisions of the Police Act, to medical retirement. Thus, from a fair reading of reg 1402(4), once the medical board has met and reported to the Commissioner of Police that a police officer is no longer fit for service the Commissioner of Police appears obliged to commence the removal process under the Police Act.
- 203 Whilst Ms Moran contended that it was unfair for the Commissioner of Police to remove her with only the payment of 28 days' pay under s 33M of the Police Act, this is determined by the Parliament, as a part of the statutory scheme. The Commissioner of Police appears to have no discretion in this respect. There was some discussion in the course of the hearing about the effect of s 33M and in particular, the terms of s 33M(2). Whilst the Commissioner of Police initially described the payment under s 33M(1) as "compensation", I do not consider that it is compensatory in nature. The Explanatory Memorandum to the Police Amendment Bill 2002 explained the basis for this new provision in the following terms at page 3. It said that the proposed s 33M:

Significantly modifies the practice under previous administrative arrangements whereby members could appeal to the WAIRC after the Commissioner recommended their removal, but before being removed. **Members also continued to receive pay and could generally resign prior to the appeal being determined.** This acted as an incentive for members to appeal, even where the appeal had no merit.

Now a member removed from office will receive a maintenance payment, based on their previous salary, for 28 days after being removed. **During this period the member may resign (see section 33O), appeal to the WAIRC (see section 33P) or take no further action.**

While members will no longer receive pay during the appeal process, the Minister is vested with a discretion, in exceptional circumstances, to direct that the member be paid a further maintenance payment for no more than 6 months **pending determination of an appeal.**

(My emphasis)

- 204 Thus it would appear that prior to the amendments, all police officers appealing their removal continued to be paid their normal salary. On the amendment, a one off payment is paid to all removed Officers, regardless of whether any appeal is taken. Any additional payment of up to an extra six months' pay, under s 33M(2) is subject to Ministerial discretion, and may only be paid in "exceptional circumstances". Importantly however, such a payment is only made "pending determination of an appeal". Thus, it appears to have the character of a "holding over" or bridging type of payment. Given that evident purpose, the absence of such a payment being made to a removed police officer, cannot, in my opinion, lead to a conclusion of unfairness in the removal itself. Furthermore, if this is the intended purpose of a s 33M(2) payment, at the time of recommending removal action to the Minister, the Commissioner of Police would not generally know if an Officer intends to appeal against their removal. Thus, at the time the removal recommendation is made by the Police Commissioner, any possible extended payment under s 33M(2) cannot be a factor in the fairness or otherwise, of the decision at that time.
- 205 Additionally, in relation to Ms Moran's criticism of the 28 day payment under s 33M(1), regard must be had to the fact that Ms Moran was on paid sick leave for one and a half years, prior to her removal. This is a period of paid sick leave vastly in excess of what an employee in general industry would be entitled to. This must be taken into account, as a part of all of the circumstances of the case. Significant in my assessment of the overall circumstances of this case, is a comparison of the circumstances of Ms Moran, and to employees in industry generally, who may also face loss of employment because of medical unfitness for work. As the cases in this jurisdiction and in the South Australian industrial jurisdiction show, Ms Moran, whilst acknowledging her grievances about the process adopted by the Commissioner of Police, was in receipt of considerably more generous arrangements than any other employee. Applying the yardstick of those cases, it is hard to see how a conclusion of unfairness can be reached in this matter, when all of the circumstances are considered.

206 Finally, as to a central theme of Ms Moran's submissions that the Commissioner of Police failed to properly acknowledge in some way, her 24 years of meritorious service to the citizens of the State, this submission has merit. The Commissioner of Police should have done so, as a matter of recognition of Ms Moran's dignity. However, this factor, in the context of all of the circumstances of the appeal, does not make Ms Moran's removal harsh, oppressive or unfair, warranting intervention by the Commission.

Conclusion

207 Accordingly, in my view, the appeal should be dismissed.

MAYMAN C:

208 I have read in advance the reasons for decision of the Chief Commissioner. I agree for the reasons he has given that the appeal should be dismissed and have nothing to add.

2015 WAIRC 00465

APPEAL AGAINST A DECISION OF THE COMMISSIONER OF POLICE TO TAKE REMOVAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

SUSAN LEANNE MORAN

APPELLANT

-v-

THE COMMISSIONER OF POLICE

RESPONDENT

CORAM

CHIEF COMMISSIONER A R BEECH
COMMISSIONER S J KENNER
COMMISSIONER S M MAYMAN

DATE

THURSDAY, 25 JUNE 2015

FILE NO/S

APPL 19 OF 2014

CITATION NO.

2015 WAIRC 00465

Result	Appeal dismissed
Representation	
Appellant	Mr K Moran, as agent
Respondent	Ms S Teoh, of counsel

Order

The Commission, pursuant to the powers conferred on it under Part IIB of the *Police Act, 1892*, hereby orders –
THAT the appeal be dismissed.

(Sgd.) A R BEECH,
Chief Commissioner.

[L.S.]

On Behalf of the Western Australian Industrial Relations Commission.

UNFAIR DISMISSAL/CONTRACTUAL ENTITLEMENTS—

2015 WAIRC 00447

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

JASON MOHSIN BESHARA AWAD

APPLICANT

-v-

JOHN WILSON OF LAUNCH FILM PRODUCTIONS

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

WEDNESDAY, 17 JUNE 2015

FILE NO/S

B 23 OF 2015

CITATION NO.

2015 WAIRC 00447

Result	Application dismissed
Representation	
Applicant	Mr J Awad on his own behalf
Respondent	Mr G McCorry as agent

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(ii) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 8th day of April 2015 the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and
 WHEREAS on the 9th day of June 2015 the applicant filed a Notice of Discontinuance in respect of the application;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2015 WAIRC 00446

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION	
PARTIES	JASON MOHSIN BESHARA AWAD	APPLICANT
	-v-	
	JOHN WILSON OF LAUNCH FILM PRODUCTIONS	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	WEDNESDAY, 17 JUNE 2015	
FILE NO/S	U 23 OF 2015	
CITATION NO.	2015 WAIRC 00446	

Result	Application dismissed
Representation	
Applicant	Mr J Awad on his own behalf
Respondent	Mr G McCorry as agent

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS on the 8th day of April 2015 the Commission convened a conference for the purpose of conciliating between the parties; and
 WHEREAS at the conclusion of that conference the applicant sought time to consider his position; and
 WHEREAS on the 9th day of June 2015 the applicant filed a Notice of Discontinuance in respect of the application;
 NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2015 WAIRC 00452

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
SANDRA BOULTER **APPLICANT**

-v-
MENTAL HEALTH LAW CENTRE (WA) INC **RESPONDENT**

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE MONDAY, 22 JUNE 2015
FILE NO/S U 247 OF 2014
CITATION NO. 2015 WAIRC 00452

Result Application dismissed
Representation
Applicant Mr T Lyons of counsel
Respondent Mr M Cox of counsel

Order

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
WHEREAS the application was set down for a Directions hearing on 19th day of March 2015 and the Commission heard from the parties in respect of the applicant's application for discovery; and
WHEREAS following that hearing the Commission issued interlocutory Orders on the 1st day of April 2015 [2015] WAIRC 00277, the 17th day of April 2015 [2015] WAIRC 00313 and the 30th day of April 2015 [2015] WAIRC 00346; and
WHEREAS on the 17th day of June 2015 the applicant filed a Notice of Discontinuance in respect of the application;
NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby dismissed.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2015 WAIRC 00475

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CONNIE FORDYCE **APPLICANT**

-v-
WAYNE ANTHONY INGRILLI T/A PRICELINE PHARMACY MIRRABOOKA **RESPONDENT**

CORAM COMMISSIONER J L HARRISON
DATE TUESDAY, 30 JUNE 2015
FILE NO/S U 67 OF 2015
CITATION NO. 2015 WAIRC 00475

Result Discontinued
Representation
Applicant Mr D Rafferty (as agent)
Respondent Mr A Houghton (of counsel)

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

The Commission listed a conciliation conference for 18 June 2015.

On 12 June 2015 the applicant advised the Commission that the matter had been resolved and the conference was vacated.

On 18 June 2015 the applicant filed a *Form 14 - Notice of withdrawal or discontinuance* and the respondent consents to the matters being discontinued.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00448

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION CHRISTA MICHAELIS	APPLICANT
	-v-	
	KARRAYILI ADULT EDUCATION CENTRE ABORIGINAL CORPORATION	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 19 JUNE 2015	
FILE NO/S	B 13 OF 2015	
CITATION NO.	2015 WAIRC 00448	

Result	Discontinued
Representation	
Applicant	In person
Respondent	Ms S Cross and later Mr T Wilmshire

Order

This is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*.

On 5 March 2015 the Commission convened a conciliation conference which was unsuccessful at resolving the issue in dispute.

On 20 May 2015 the applicant advised that she did not wish to proceed with the matter.

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 25 May 2015 and the respondent consents to the matter being discontinued.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00476

	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
CITATION	: 2015 WAIRC 00476
CORAM	: COMMISSIONER J L HARRISON
HEARD	: WEDNESDAY, 6 MAY 2015
DELIVERED	: TUESDAY, 30 JUNE 2015
FILE NO.	: B 176 OF 2014
BETWEEN	: ANDREW NOAD Applicant AND STEVE COTCHIN, BUTLER INTERIORS PTY LTD Respondent

Catchwords	:	Contractual benefits claim - Entitlements under contract of employment - Claim for payment of wages and pay in lieu of notice - Whether applicant had a contract of service with the respondent - Commission finds no binding contract - Applicant not employed by respondent - Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> s 7, s 27(1) and s 29(1)(b)(ii)
Result	:	Application dismissed
Representation:		
Applicant	:	In person
Respondent	:	Ms C Veaney and Mr S Cotchin

Case(s) referred to in reasons:

Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc) (1999) 79 WAIG 1867

Appelby v Johnson (1874) LR 9 CP 158

Balfour v Travel Strength Ltd (1980) 60 WAIG 1015

Bridge Shipping Pty Ltd v Grand Shipping SA and Anor [1991] 173 CLR 231

Hotcopper Australia Ltd v David Saab (2001) 81 WAIG 2704

Perth Finishing College Pty Ltd v Watts (1989) 69 WAIG 2307

Rai v Dogrin Pty Ltd [2000] 80 WAIG 1375

Reasons for Decision

- 1 On 13 August 2014 Andrew Noad (the applicant) lodged this application claiming that he was owed benefits under his contract of employment with Steve Cotchin, Butler Interiors Pty Ltd (the respondent). The applicant is seeking the following benefits:

\$3,269.23 gross for two weeks' pay; and

\$310.58 in superannuation contributions on this amount.

The respondent disputes that the applicant is entitled to the benefits he is seeking.

Name of the respondent

- 2 During the hearing it became apparent that the respondent was incorrectly named. Given the Commission's powers under s 27(1) of the *Industrial Relations Act 1979* (the Act) and as it is appropriate for the respondent to be correctly named, I will issue an order that Steve Cotchin, Butler Interiors Pty Ltd be deleted as the named respondent in this application and be substituted with Butler Interiors Pty Ltd (see *Rai v Dogrin Pty Ltd* (2000) 80 WAIG 1375 and *Bridge Shipping Pty Ltd v Grand Shipping SA and Anor* [1991] 173 CLR 231).

Background

- 3 The respondent designs, manufactures and fits cabinets and furniture. It has 10 employees who work in sales, design and manufacture. Mr Steven Cotchin became the respondent's director on 1 July 2014 when Mr Gavin Butler ceased undertaking this role. After the applicant applied for the position of Sales Design Consultant with the respondent he was interviewed by Mr Butler and Mr Cotchin in early June 2014. After this meeting the following email exchange took place between the applicant, who was overseas at the time, and Mr Cotchin. There was no dispute that the respondent offered the position of Sales Design Consultant to the applicant on 26 June 2014 and Mr Cotchin sent the applicant an employment contract containing the applicant's terms and conditions of employment (the Contract) (exhibit A1). The applicant accepted the respondent's offer of employment and he confirmed this acceptance by signing the Contract sent to him and emailing his signature to Mr Cotchin on 26 June 2014.

14 June 2014 9.24 am

Hi Andrew

Thanks for coming in the other day, it was good to meet you.

I still need some time to think and weigh a few of my options up before making a decision on the position.

And I am not sure whether I can make this decision before you go on holidays.

Are you contactable whilst you are on holidays via email?

Talk soon.

Regards

Steve Cotchin

15 June 2014 7.07 am

Hi Steve,

I was on the road when I read your email yesterday. I had already written a short additional comment to send to you and Gavin, so I'll send it here in case it is of interest to you going forward.

I don't recall if I mentioned to you at our meeting that I am regularly in touch with a couple of builders who do top end houses (around \$10m). It would be possible to approach them and offer to take on all the cabinet work and free-standing built furniture as Design and Construct/Install contracts. A couple of contracts from them per year would be decent projects. They also do major renovations and the cabinet work is virtually the same amount as in a new house. You probably also have established relationships with such builders judging by the quality of your work.

Kind regards,
Andrew Noad

16 June 2014 7.04 am

Thanks for the reply Andrew
Speak soon
Regards
Steve Cotchin

16 June 2014 9.25 am

Steve,

I appreciate this is an important decision for your business and should be made in your own time. It is clear to me you have the capacity to deliver high quality product. What you are now looking for is the business-generating engine.

It would help me if you would just let me know if I am in serious contention or not, as I have other options I can pursue.

Kind regards,
Andrew Noad

16 June 2014 11.30 am

Hi Andrew
You have pretty much hit the nail on the head there.
I am seriously considering your application. I just need some time to weigh things up before making a decision.
Talk soon
Regards
Steve Cotchin

16 June 2014 11.30 am

Thanks Steve. I'll leave you in peace to cogitate.
Kind regards,
Andrew

26 June 2014 3.43 am

Hi Andrew,

Since speaking with you last I have put a lot of thought into the Sales and Design position and would like to offer this position to you.

The terms are more or less as discussed with Gavin and myself, however I have attached an employment contract for you to take a look at.

I feel that you would be a valuable asset to Butler Interiors and think that your creativity and experience would assist us in the exciting times this company has ahead.

Please let me know your thoughts.

I would appreciate your decision by close of business 30th June 2014.

Talk soon
Regards

Steve Cotchin

26 June 2014 6.58 pm

Hi Steve,

Thanks for your email and the offer to come and work with you. I am looking forward to it.

As I mentioned previously I am currently in the UK and will be back on the 8th July. Starting on the 9th is fine with me.

I have had to sign the employment agreement electronically and will need to get it witnessed formally when I get back from travelling. I trust that will be OK with you.

Kind regards,
Andrew

27 June 2014 6.24 am

Hi Andrew

That's great news.

Your office will be ready to go for you.

I am getting a new computer installed in there on Monday with 2 screens.

Also I will set you up with a work email address [email address]
it will have auto sketch installed and Microsoft office on it.
I am sure you will get your head around auto sketch rather quickly.
I will get Caitlin to organize business cards too.
Something along the lines of
Andrew Noad
Sales design consultant
Sorry I didn't realise you were back on the 8th.
You can start on the Monday the 14th if you like, totally up to you.
Talk soon.
Regards.
Steve Cotchin

27 June 2014 12.40 am

Hi Andrew
Thinking again with your job title
Are you a qualified interior designer?
If so it may be good to have this on your card as well
Regards
Steve Cotchin

28 June 2014 8.19 pm

Hi Steve,
Have been on the road and unable to respond until now. Starting on 14th would be good for me, thanks. I can shake off any jet lag and take care of a few things.
Regarding my business card, I am not a qualified Interior Designer, but have typically included the following description on my business cards - *Residential and Commercial Interiors*, along with Building Design. The fact is that I have designed interiors for 30+ years, including lighting; designing and manufacturing lighting and furniture, designing shop, office, cafe and restaurant interiors.
So, for example, you might put the following on my business card:
Andrew Noad
Sales Design Consultant
Residential and Commercial Interiors
I have been talking with my accountant and he recommended I contract with you as an independent contractor and not as an employee. To all intents and purposes this is no different for you and virtually all the terms and conditions in the employee agreement remain the same. It offers me a slightly better arrangement as my car, for example, is owned by my company. It is a slightly better tax structure for me. This same arrangement was how I contracted in Melbourne. Each agreed payment period (e.g. fortnightly) I would submit an invoice for payment within 7 days.
If you want to discuss this further we could do so on my first day.
See you on the 14th.
Kind regards,
Andrew

29 June 2014 12.04 pm

Hi Andrew
With the contract thing I cannot do this, it raises too many grey areas as I have also been down this path with previous candidates for this position.
As you can only do 80% of your work with Butler Interiors and 20% with someone else if you are contracting.
This position requires you to come in as an employee and have you committed 100% to Butler Interiors.
As for the business card I might just leave it as
Andrew Noad
Sales design consultant
We can change this down the track if opportunities arise into the interior design side of things.
Please let me know your thoughts on all of this.
Talk soon.
Regards
Steve Cotchin

14 July 2014 2.41 pm

Dear Steve,
This emails confirms your conversation with me by phone a few minutes ago where you indicated you will not honour your contractual obligation to me.
Yours sincerely,

Andrew Noad

- 4 On 18 July 2014 the applicant sent the respondent the following letter of resignation from the position of Sales Design Consultant.

I am writing to advise you of my intention to resign from the position you offered me at Butler Interiors.

I have taken legal advice and as per Clause 1.4 (b) of the Employment Agreement, which I signed and you accepted, and having received nothing in writing from you at the time of writing this letter, I herewith give one week's notice as of 21st July 2014. My last day will be the 25th July.

You are therefore obliged to pay me for 2 week's salary plus 2 week's superannuation contribution. Based on the agreed salary of \$85,000/year plus super these amounts are:

Salary \$3,269.23

To be paid into:

[bank account details]

PLUS

Superannuation contribution of 9.5% = \$310.58

To be paid into:

[superannuation account details]

Full payment is expected on the 25th July 2015.

(exhibit A2)

- 5 The last page of the Contract signed by the applicant and returned by email to Mr Cotchin on 26 June 2014 is as follows in part (exhibit A1):

Date:

SIGNED for and on behalf of

Butler Interiors Pty Ltd by

.....

Steve Cotchin

I acknowledge and declare that I have read and fully understand the terms and conditions contained in this agreement and accept that I will observe them fully during my employment:

...signature.....

Signature of employee

Andrew Noad

Date: 26/6/2014

.....

Signature of witness

Witness Name: [_____]

Date:

(extract exhibit A1)

Evidence

Applicant

- 6 The applicant stated that he could not email a witnessed copy of his signature on the Contract to Mr Cotchin as it was technically not possible. He understood that Mr Cotchin accepted his agreement to be bound by the Contract given that the email Mr Cotchin sent in response on 27 June 2014 referred to the respondent organising an office and business card for him and confirming he could commence work on 14 July 2014. The applicant stated that after he sent the signed signature page of the Contract to Mr Cotchin agreeing to be bound by the terms of the Contract he sent an email to Mr Cotchin on 28 June 2014 proposing that he be a contractor to the respondent and on 29 June 2014 Mr Cotchin told him that he had concerns about the applicant working with the respondent as a contractor. The applicant claimed he raised the issue of being a contractor to the respondent after signing the contract to generate discussion about this issue on his first day of employment. As Mr Cotchin had mentioned details about the applicant's business card in this email he understood that raising the possibility of being a contractor to the respondent had not affected his employment with the respondent. The applicant said that he did not respond to Mr Cotchin's request for feedback about working as a contractor as it was logistically difficult for him to reply because he was travelling. The applicant understood that he would be starting work with the respondent as an employee on 14 July 2014 and there was the possibility of being a contractor to the respondent at a later stage.
- 7 When the applicant attended the respondent's premises on 14 July 2014 to commence work Mr Cotchin told him that as he had not heard from the applicant he had restructured the respondent's business and the applicant was no longer required by the respondent to work in the position of Sales Design Consultant. They discussed the applicant working as a contractor and employee and Mr Cotchin said he would contact him later that afternoon after he had considered whether the respondent would employ the applicant. During this discussion the applicant told Mr Cotchin that he was prepared to start working with the respondent as an employee. Later that afternoon the applicant contacted Mr Cotchin and he told him that the respondent did not intend to employ him as a Sales Design Consultant. The applicant stated that he did not receive any written notice of his termination as required in the Contract and as he had no further contact from the respondent he resigned at the end of that week giving one week's notice. The applicant believed he had been treated shabbily as the respondent offered him employment which he accepted unconditionally.

Respondent

- 8 When the applicant raised the issue of being a contractor to the respondent Mr Cotchin believed he was not committed to working full-time for the respondent. Mr Cotchin was told by his accountant that if the applicant was a contractor he would have to undertake work for another business for approximately 20% of his working time and this was not acceptable to the respondent. When Mr Cotchin did not receive a response to his concerns about the applicant working as a contractor that he had raised in his email to the applicant dated 29 June 2014 he reorganised the respondent's operations without the need to employ a Sales Design Consultant. Mr Cotchin decided not to fill the position of Sales Design Consultant as he had restructured the respondent's operations and redistributed the duties required of the Sales Design Consultant role using his existing employees. Mr Cotchin took on more of the sales work and another employee did more setting out work and this freed up funds to employ an apprentice at the end of the year and for employees to undertake training.
- 9 Mr Cotchin said he was surprised when the applicant turned up to the respondent's premises on 14 July 2014 to start work because he had not heard from him for some time. After having a discussion with the applicant Mr Cotchin gave further consideration to employing the applicant. Later that day he spoke to the applicant on the telephone and told him he had restructured the respondent's operations and the position of Sales Design Consultant no longer existed. Mr Cotchin agreed that the applicant told him on 14 July 2014 that he would commence work with the respondent as an employee if the respondent did not want him to work as a contractor.
- 10 Mr Cotchin understood that the Contract signed by the applicant was invalid because the applicant's signature was not witnessed nor did the respondent sign the Contract. Mr Cotchin also believed the Contract was invalid because after the applicant signed it he wanted to change the terms of the Contract to be a contractor instead of an employee.
- 11 Mr Cotchin said that he was pleased when the applicant accepted the respondent's offer to be employed as a Sales Design Consultant and at the time he was happy to employ the applicant. He became concerned when the applicant proposed that he be a contractor and this would have resulted in a new contract having to be negotiated. Mr Cotchin stated that when the applicant did not respond to the email he sent him on 29 June 2014 where he expressed concerns about the applicant working as a contractor and asked for feedback from him he believed that the applicant was no longer interested in working with the respondent.

Submissions

Applicant

- 12 The applicant maintains that he had a binding contract with the respondent that he would be employed as its Sales Design Consultant. The applicant accepted and signed the Contract after the respondent made an offer to employ him and the applicant was not given any indication that the respondent was not going to honour their agreement to employ him.
- 13 The applicant maintains even if the respondent did not sign the Contract there was an agreement between the parties for the applicant to be employed by the respondent given the content of the email from Mr Cotchin on 27 June 2014 after the applicant confirmed his acceptance of the offer of employment by returning the signature page of the Contract. The fact that his signature on the Contract was not witnessed is of no consequence. Additionally, the applicant was not terminated by the respondent in accordance with the Contract. The applicant maintains that he only raised the issue of being a contractor to the respondent for discussion with Mr Cotchin and he said he did not respond to Mr Cotchin's email dated 29 June 2014 about being a contractor to the respondent because he believed this issue could be discussed on his first day of employment. The applicant maintains that his lack of response to Mr Cotchin's email did not mean that he rescinded his acceptance of the respondent's offer of employment. The applicant understood the respondent's offer to employ him was still valid as Mr Cotchin discussed the content of the applicant's business cards in the same email he raised concerns about the applicant being a contractor to the respondent.

Respondent

- 14 There was an offer of employment made by the respondent to the applicant but there was not a binding employment contract between the applicant and the respondent. The applicant did not commence employment with the respondent and the Contract signed by the applicant was invalid as his signature was not witnessed. The terms of the applicant's employment with the respondent were not finalised and agreed by both parties and the respondent did not sign the contract. The respondent submits that even if it could be argued that the Contract was in place at some point, it was negated once the applicant sent his email to Mr Cotchin proposing that he be a contractor to the respondent. It was not appropriate to discuss the applicant being a contractor to the respondent after the applicant commenced employment. Mr Cotchin made it clear to the applicant on 14 July 2014 that the applicant was not going to be employed by the respondent.

Consideration

Witness Credit

- 15 The evidence given by Mr Cotchin and the applicant with respect to the facts relevant to this case was not in contest. I therefore accept the evidence they gave.

Are the benefits the applicant is claiming due to be paid to him?

- 16 The claims before the Commission are for an alleged denial of contractual benefits. For an applicant to be successful in such a claim a number of elements must be established. The claim must relate to industrial matters contained in s 7 of the Act and the claimant must be an employee. The claimed benefits must be contractual benefits to which there is an entitlement under the applicant's contract of service, the benefits claimed must not arise under an award or order of this Commission and the benefits must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704; *Ahern v Australian Federation of Totally and Permanently Incapacitated Ex-Service Men and Women (WA Branch Inc)* (1999) 79 WAIG

1867. The meaning of 'benefit' has been interpreted widely in this jurisdiction: *Balfour v Travel Strength Ltd* (1980) 60 WAIG 1015; *Perth Finishing College Pty Ltd v Watts* (1989) 69 WAIG 2307.

- 17 For a contract to be formed there must be an intention between the parties to create a legal relationship in terms that are enforceable and there must be an offer by one party and its acceptance by the other. The contract must be supported by valuable consideration and the parties must be legally capable of making a contract. The parties must genuinely consent to the terms of the contract and the contract must not be entered into for any purpose which is illegal (see Sappideen C et al; *Macken's Law of Employment* (7th ed, 2011), 96). Acceptance of an offer must be unqualified and must correspond with all the terms of the offer. If the offer is conditional, those conditions must be satisfied before there is acceptance. So 'if the acceptance is not clear and certain, but leaves something to be arranged, something for future discussion and decision, the parties are not ad idem' (*Appelby v Johnson* (1874) LR 9 CP 158, 164 per Grove J) (see Sappideen C et al; *Macken's Law of Employment* (7th ed, 2011), 100).
 - 18 It is clear from the above that one of the elements required for a contract to be formed and have effect includes all terms contained in an employment contract offered by an employer to a prospective employee being genuinely agreed to and accepted by the employee. Otherwise the contract is void.
 - 19 The offer and acceptance of the Contract in this instance was predicated on the applicant genuinely agreeing to be bound by all of the terms of the Contract which he signed on 26 June 2014. I find that the Contract signed by the applicant for the position of Sales Design Consultant with the respondent is void and of no effect as the applicant did not genuinely consent to abide by all of its terms. I have reached this conclusion on the basis that after signing the Contract and prior to commencing employment with the respondent the applicant sought to negotiate changes to the terms of the Contract. When there was no resolution of the changes to the Contract being sought by the applicant I find that the applicant did not genuinely accept all of the terms of the Contract he accepted and signed on 26 June 2014.
 - 20 It was not in dispute that the respondent offered the applicant employment as a Sales Design Consultant in the terms set out in the Contract and the applicant accepted employment with the respondent on this basis. After the applicant accepted the respondent's offer of employment he emailed a copy of his signature on the Contract to Mr Cotchin. Soon after doing so the applicant emailed Mr Cotchin raising the issue of being a contractor to the respondent instead of being an employee. At the time the applicant told Mr Cotchin that the terms of the Contract signed by him would be 'virtually' the same if he was a contractor to the respondent and he proposed that being a contractor to the respondent instead of an employee could be discussed with Mr Cotchin on the day he started working with the respondent. In response, on 29 June 2014 Mr Cotchin emailed the applicant telling him that the applicant could not be a contractor to the respondent and he told the applicant that he wanted him to work for the respondent on a full-time basis as an employee. Mr Cotchin told the applicant that he understood that as a contractor he could not work full-time with the respondent because he would be required to work for another entity in addition to working for the respondent. He then asked the applicant to respond to him about his decision that the applicant could not be a contractor to the respondent. The applicant did not do so and the issue of whether the applicant accepted being a full-time employee of the respondent as provided for in the Contract or if he would only work for the respondent as a contractor remained unresolved.
 - 21 I find that the applicant sought to vary the terms of the Contract when he indicated to Mr Cotchin that he wanted to be a contractor and not an employee of the respondent prior to commencing employment with the respondent. I find that the applicant was aware that some of the terms of the Contract he accepted and signed would have to be altered if he was to be a contractor to the respondent because in the applicant's email to Mr Cotchin dated 28 June 2014 he referred to the terms of the Contract being 'virtually the same' if he was to be a contractor to the respondent. That is, some of the terms of the Contract would need to be changed if the applicant was to be a contractor to the respondent. The terms of the Contract which the applicant accepted and signed confirm that the applicant was to be employed on a full-time basis under a contract of service in the position of Sales Design Consultant. Additionally, the Contract prohibits the applicant working with another entity whilst employed by the respondent (see the terms of clauses 9(a) and (b) of the Contract). When Mr Cotchin received no response from the applicant confirming if he was prepared to be employed as a full-time employee under the terms of the Contract after telling the applicant that he could not be a contractor to the respondent Mr Cotchin restructured the respondent's operations without the need to employ anyone in the position of Sales Design Consultant as this position had been abolished. I find that in the absence of clarification from the applicant that he was prepared to be bound by the terms of the Contract and be a full-time employee of the respondent instead of working as a contractor when asked by Mr Cotchin about his intentions, that it was open to the respondent to abolish the position of Sales Design Consultant and withdraw the offer of employment to the applicant for this position even though this offer of employment had been accepted by the applicant. The applicant claimed that logistical issues prevented him from responding to Mr Cotchin about not working as a contractor to the respondent but no details or evidence was provided at the hearing in support of any difficulty experienced by the applicant in this regard. There was no dispute that the applicant offered to commence work as an employee of the respondent under the terms of the Contract on the day he presented for work with the respondent on 14 July 2014, however, by that point the respondent had abolished the position offered to the applicant as Mr Cotchin was unaware if the applicant was prepared to abide by the terms of the Contract he had signed.
 - 22 As the applicant was never employed by the respondent under a contract of service he is not due the benefits he is claiming.
 - 23 An order will issue dismissing this application.
-

2015 WAIRC 00488

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ANDREW NOAD
APPLICANT

-v-
BUTLER INTERIORS PTY LTD
RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE FRIDAY, 3 JULY 2015
FILE NO/S B 176 OF 2014
CITATION NO. 2015 WAIRC 00488

Result Application dismissed
Representation
Applicant In person
Respondent Ms C Veaney and Mr S Cotchin

Order

HAVING HEARD the applicant on his own behalf and Ms C Veaney and Mr S Cotchin on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

1. THAT the name of the respondent be deleted and Butler Interiors Pty Ltd be substituted in lieu thereof.
2. THAT the application otherwise be and is hereby dismissed.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00482

PARTIES WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
ANDREW JOHN PULLEN
APPLICANT

-v-
AUTISM ASSOCIATION OF WESTERN AUSTRALIA
RESPONDENT

CORAM COMMISSIONER J L HARRISON
DATE THURSDAY, 2 JULY 2015
FILE NO/S U 250 OF 2014
CITATION NO. 2015 WAIRC 00482

Result Discontinued
Representation
Applicant Mr L Durand (of counsel)
Respondent Ms M Ivanovski (of counsel)

Order

This is an application pursuant to s 29(1)(b)(i) of the *Industrial Relations Act 1979*.

The Commission convened a conciliation conference on 6 February 2015.

By letter dated 17 June 2015 the applicant notified the Commission that he wanted to withdraw the application and the respondent consents to the matters being discontinued.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

[L.S.]

(Sgd.) J L HARRISON,
Commissioner.

2015 WAIRC 00449

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION PAUL RICHARDSON	APPLICANT
	-v- AEG OGDEN PERTH PTY LTD	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	FRIDAY, 19 JUNE 2015	
FILE NO/S	B 19 OF 2015	
CITATION NO.	2015 WAIRC 00449	

Result	Discontinued
Representation	
Applicant	In person
Respondent	Mr L Moloney (as agent)

Order

This is an application pursuant to s 29(1)(b)(ii) of the *Industrial Relations Act 1979*.

On 10 March 2015 the Commission convened a conciliation conference which was unsuccessful at resolving the issue in dispute.

The Commission was advised on 26 March 2015 that the applicant did not wish to proceed with the matter.

The applicant filed a *Form 14 - Notice of withdrawal or discontinuance* on 28 May 2015 and the respondent consents to the matter being discontinued.

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders:

THAT this application be, and is hereby discontinued.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

SECTION 29(1)(b)—Notation of—

Parties	Number	Commissioner	Result	
David O'Neill	GB and G Nicoletti	U 20/2015	Commissioner S J Kenner	Discontinued
Mr Kim Chua	Shire of Merredin	B 31/2015	Commissioner S J Kenner	Discontinued

CONFERENCES—Matters arising out of—

2015 WAIRC 00474

DISPUTE RE PROPOSED INDUSTRIAL ACTION WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00474
CORAM	:	PUBLIC SERVICE ARBITRATOR COMMISSIONER J L HARRISON
WRITTEN SUBMISSIONS	:	THURSDAY, 11 JUNE 2015, TUESDAY, 16 JUNE 2015
DELIVERED	:	TUESDAY, 30 JUNE 2015
FILE NO.	:	PSAC 1 OF 2009
BETWEEN	:	DEPARTMENT OF EDUCATION AND TRAINING Applicant AND THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED Respondent

Catchwords	:	Industrial Law (WA) - Dispute regarding industrial action relating to workloads of school support staff - Whether consent order should be revoked and application closed - Consent order revoked and application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> s44
Result	:	Consent order revoked; Application dismissed
Representation:		
Applicant	:	Ms A Young
Respondent	:	Ms L Kennewell

Reasons for Decision

- 1 This application was lodged under s 44 of the *Industrial Relations Act 1979* (the Act) on 28 January 2009. The Department of Education and Training (the applicant) sought a conference before the Public Service Arbitrator (the Arbitrator) concerning threatened industrial action by members of the Civil Service Association of Western Australia Incorporated (the respondent) employed by the applicant.
- 2 The Arbitrator, differently constituted, issued an order on 30 January 2009 that industrial action cease.
- 3 The matter was reallocated to the Arbitrator as currently constituted and numerous conciliation conferences took place. The parties agreed on a consent order issuing containing an interim arrangement for trialling a proposal to deal with the issue of workloads of support staff. On 26 November 2009 the following consent order issued:
 1. THAT the parties agree to adopt and abide by the terms contained in the attached schedule.
 2. THAT this order and attached schedule are to remain in force until revoked or varied by the Arbitrator.
 3. THAT the parties have liberty to apply to vary this order and schedule.
- 4 Attached to this consent order was the following schedule:

INTERIM CONSENT ARRANGEMENT

1. That additional resources to the equivalent of 19 Full Time Equivalent ('FTE') for libraries funded at Level 1 and 93 FTE for school support staff positions funded at Level 2 will be allocated to schools for employment of school support staff. Along with the specific library FTE, all schools will receive an additional 0.2 FTE at Level 2 and five (5) Administrative Support Days with the exception of the Remote Community Schools who will receive 41 Administrative Support Days.
 2. If a school needs to convert part or all of the 0.2 FTE at Level 2 to obtain further Administrative Support Days, the school must make out a business case for the conversion. The school's case will be considered and determined using the process outlined in point 4 of this Interim Consent Arrangement.
 3. The resources will be implemented as from Term 1, 2010. The impact of the increase will be monitored by the parties for a period of six (6) months. A progress review will then be conducted at the end of Term 2, 2010 and a decision taken as to whether to extend the trial.
 4. During the implementation of the proposal, the Department of Education and Training and the Civil Service Association of Western Australia Incorporated shall monitor issues arising out of the process, including whether the proposal is meeting its objectives or the workload needs of school support staff, and how those issues might be resolved or managed through the Joint Consultative Committee.
 5. The parties agree that the additional resources are only to be used to assist in alleviating the existing workload issues facing school support staff. Any decision to shift new functions must be assessed for resourcing needs prior to their implementation.
 6. The proposal is implemented without prejudice to the ongoing discussion between the parties with respect to Information Computing Technology requirements within schools.
 7. Any dispute arising out of the conditions set out in points 2 to 5 above shall be referred to the Commission for conciliation and arbitration.
- 5 When the Commission contacted the parties about closing the file the parties were in dispute about whether this should occur.
 - 6 The applicant believes the file should be closed. The interim consent arrangement is out of date and the issues relevant to this application have been overtaken as a result of a new funding model for staff allocation being implemented by the applicant.
 - 7 The respondent believes the file should remain open as issues relating to the workload of support staff remain and have been exacerbated by the new funding model.

Consideration

- 8 When taking into account s 26(1)(a) of the Act considerations and equity, good conscience and substantial merit, and having considered the respective positions of the parties, I have formed the view that the consent order be revoked and this file be closed.
- 9 I have reached this conclusion as the provision of funding provided for in points 1 and 2 of the Interim Consent Arrangement attached to the consent order has been overtaken by a new funding model. As a result the Interim Consent Arrangement is of no effect and should be revoked as provided for in the consent order.

10 The consent order will be revoked and this application dismissed.

11 An order will issue to this effect.

2015 WAIRC 00486

DISPUTE RE PROPOSED INDUSTRIAL ACTION

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

DEPARTMENT OF EDUCATION AND TRAINING

PARTIES

APPLICANT

-v-

THE CIVIL SERVICE ASSOCIATION OF WESTERN AUSTRALIA INCORPORATED

RESPONDENT

CORAM

PUBLIC SERVICE ARBITRATOR

COMMISSIONER J L HARRISON

DATE

FRIDAY, 3 JULY 2015

FILE NO

PSAC 1 OF 2009

CITATION NO.

2015 WAIRC 00486

Result

Consent order revoked; Application dismissed

Representation

Applicant

Ms A Young

Respondent

Ms L Kennewell

Order

HAVING HEARD Ms A Young on behalf of the applicant and Ms L Kennewell on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the Order which issued in this matter dated 26 November 2009 (being Order 2009 WAIRC 01233) is hereby revoked.
2. THAT this application be, and is otherwise hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner,
Public Service Arbitrator.

[L.S.]

CONFERENCES—Matters referred—

2015 WAIRC 00451

DISPUTE RE ROSTERING PRACTICES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION

: 2015 WAIRC 00451

CORAM

: COMMISSIONER J L HARRISON

HEARD

: WEDNESDAY, 29 APRIL 2015

DELIVERED

: FRIDAY, 19 JUNE 2015

FILE NO.

: CR 29 OF 2012

BETWEEN

: THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES,
WEST AUSTRALIAN BRANCH

Applicant

AND

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

Respondent

Catchwords	:	Industrial Relations (WA) - Dispute regarding use of contractors to undertake duties at Victoria Park train station - Orders sought that a new base roster be developed for Passenger Ticketing Assistants incorporating the duties undertaken between 2.45 pm and 4.45 pm on weekdays - Not appropriate for Commission to interfere with respondent's decision to roster contractors instead of Passenger Ticketing Assistants - Application dismissed
Legislation	:	<i>Industrial Relations Act 1979</i> s 6(a), s 6(ad), s 6(af), s 26(1)(a) and s 44
Result	:	Application dismissed
Representation:		
Applicant	:	Mr C Fogliani (of counsel) and Mr K Singh
Respondent	:	Mr R Farrell (of counsel)

Case(s) referred to in reasons:

Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd (1987) 67 WAIG 733

Federated Engine Drivers' and Firemen's Union of Workers of Western Australia v Robe River Iron Associates (1986) 67 WAIG 763

Jones v Dunkel (1959) 101 CLR 298

Reasons for Decision

- 1 On 25 May 2012 the Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch (the applicant) made an application to the Commission under s 44 of the *Industrial Relations Act 1979* (the Act) concerning dispute with the Public Transport Authority of Western Australia (the respondent) over rostering practices. After Kenner C decided the matters in dispute his decision was appealed to the Full Bench and the Full Bench quashed his decision (FBA 5/2014). The application was then allocated to the Commission as currently constituted for determination. A further hearing took place to deal with one outstanding dispute between the parties. This issue relates to whether Passenger Ticketing Assistants (PTAs) or MSS Security Pty Ltd (MSS) contractors should be rostered to work at the Victoria Park train station (the Station) between 2.45 pm and 4.45 pm on weekdays (the afternoon shift).
- 2 The schedule of the Further Memorandum of matters referred for hearing and determination is as follows:

The parties are in dispute about rostering and demarcation issues. The dispute relates to the respondent's use of MSS Security Pty Ltd (MSS) contractors at Victoria Park train station between 14.45 and 16.45 on weekdays.

The applicant seeks the following orders:

- (a) THAT the respondent consult with its employees on the Armadale line about the development of a new base roster for Passenger Ticketing Assistants (PTAs) on the Armadale line.
- (b) THAT the duties undertaken at Victoria Park between 14:45 and 16:45 on weekdays are to be incorporated into the new base roster.

The respondent opposes the orders being sought by the applicant. The respondent claims that clauses 3.4 and 3.5 of the *Public Transport Authority Railway Employees (Transperth Train Operations) Industrial Agreement 2014* adequately provide for roster development for PTAs on the Armadale line.

Claims:

Applicant

1. The respondent has unreasonably exercised its managerial prerogative by refusing to allow PTAs to perform work at Victoria Park between 14:45 and 16:45 on weekdays.
 - (a) The work performed by the MSS contractors at Victoria Park between 14:45 and 16:45 is identical to the work that is normally performed by PTAs.
 - (b) The MSS contractors who are working at Victoria Park between 14:45 and 16:45 on weekdays are performing customer service duties in addition to revenue protection duties. Customer service duties are outside of the scope of the work allowed to be performed by MSS contractors under the contract between the respondent and MSS.
 - (c) Rostering PTAs at Victoria Park between 14:45 and 16:45 would add more flexibility into the Armadale line roster.
 - (d) It is cheaper to have PTAs performing the work at Victoria Park than it is to have MSS contractors performing the work.

Respondent

2. The services supplied by MSS at Victoria Park train station between 14:45 and 16:45 on weekdays meet the respondent's operational requirements at that place and time. Meeting the operational requirements in this way rather than by rostering PTAs to undertake these services is a reasonable and appropriate exercise of the respondent's right to manage.

- (a) MSS provides revenue protection and casual guard security services at Victoria Park train station between 14:45 and 16:45 on weekdays to provide a physical security presence at the station and to ensure the safety of passengers. In doing so staff provided by MSS are expected to conduct themselves in a friendly and courteous manner when dealing with passengers and they are available and competent to meet the respondent's operational requirements.
- (b) The services supplied by MSS at the relevant place and times are within the scope of the contract between the respondent and MSS. That scope is able to be varied if, in the opinion of the Director Security Services, Transperth Train Operations Division, it was necessary to do so. Any issue about the operation of the contract is a matter between the parties to the contract, provided the services sought by the respondent are being supplied by MSS.
- (c) The respondent does not concede that rostering PTAs at Victoria Park train station between 14:45 and 16:45 would add more flexibility to the Armadale line PTA roster. The respondent argues that rostering PTAs would have operational disadvantages, including complicating the handover of responsibility for station staffing between the Customer Service Branch and the Security Services Branch of the Transperth Train Operations Division before afternoon peak services.
- (d) The allocation of revenue protection and casual guard security services provided by MSS to Victoria Park train station between 14:45 and 16:45 on weekdays does not result in additional cost because the revenue protection and casual guard security services would otherwise be supplied providing a physical presence on urban train services at those times. The decision to allocate the services to Victoria Park train station is based on the respondent's assessment that it is a higher operational priority.

3 The applicant's claim at 1(c) of the Memorandum was abandoned at the hearing.

4 A statement of agreed facts is as follows:

1. The Victoria Park station does not have fare gates.
2. The Victoria Park station is across the road from The Perron Centre. The Perron Centre is the offices for the Association for the Blind – Guide Dogs WA. The close proximity between Victoria Park station and the Perron Centre has resulted in a higher than usual proportion of patrons with impaired vision on that part of the network.
3. The opening hours of the Perron Centre are from 0830 to 1700 hours, Monday to Friday.
4. The current Armadale Line Passenger Ticketing Assistant (PTA) roster rosters a single Passenger Ticketing Assistant to Victoria Park Station from 0700 to 1500 hours from Monday to Friday.
5. Of the 74 weekday shifts listed on the Armadale Line Passenger Ticketing Assistant fortnightly base roster, all but six end at 1500 hours. Two Friday shifts at the Armadale station end each week at 1600 hours. In addition, one Friday shift at Kelmscott station is commonly extended to end each week at 1600 hours.
6. The role of a Passenger Ticketing Assistant relevantly includes monitoring and assisting passengers in the use of the Transperth ticketing system and associated ticketing equipment and providing advice and assistance to passengers using Transperth facilities and services in a friendly and professional manner.
7. The core duties and responsibilities of a Passenger Ticketing Assistant relevantly include:
 - 7.1. providing an effective and proactive approach to Customer Service by maintaining a physical presence and by offering assistance and direction to members of the public seeking access to station facilities and utilising services.
 - 7.2. Providing customers with ticketing assistance, direction and relevant Transperth information concerning Train and Bus schedules, travel mode options and train/bus facilities to the extent of their skills and training. This includes where required, the provision of information to rail travelling groups such as ... special needs groups.
 - 7.3. Monitors and assists customers entering/leaving stations via fare gates. This duty includes checking the validity of tickets, issuing of infringements, providing basic revenue protection and addressing fair evasion.
 - 7.4. Operating equipment appropriate to the role such as two way radios, ... control booths and public address equipment.
 - 7.5. Providing organisational feedback on the use of Transperth services and facilities, reporting anomalies in a timely manner. Provides appropriate assistance to Passengers in periods of service disruption and emergency situations
 - 7.6. Liaising with Security and/or other staff to initiate appropriate action for obtaining support, back up or advice as and when demanded by circumstances....
8. The role of a Transit Officer relevantly includes:
 - 8.1. ensuring passenger safety and security whilst on the passenger rail network...; and
 - 8.2. providing assistance and information to passengers in a friendly and professional manner.
9. The core duties and responsibilities of a Transit Officer relevantly include:
 - 9.1. Circulating on train stations and car parks to ensure a safe and secure environment for passengers;

- 9.2. Providing a full range of customer service assistance and information concerning Urban Rail and Metropolitan Bus and Ferry services and in medical emergencies renders first aid consistent with the level of proficiency;
 - 9.3. Ensuring customer complaints and enquires are dealt with ...
 - 9.4. Carrying out regular ticket inspections;
 - 9.5. Interacting with passengers to enhance and promote the positive image of Public Transport Authority and the services it offers; and,
 - 9.6. Operates in potentially complex and stressful environments such as assisting emergency and safety control officers as directed in the event of emergencies, security or system failures and operational needs.
10. The respondent has over the past decade been unable to recruit sufficient suitable applicants to fill all of the approved and funded Transit Officer positions.
 11. The respondent engages a contractor, MSS Security Pty Ltd (MSS), to provide certain services, referred to as "Transperth Trains Revenue Protection and Casual Guard Security Services", for the respondent.
 12. The scope of those services which MSS has contracted to provide includes providing "suitably qualified staff" who, among other things, "will be required to:
 - 12.1. Provide a physical security presence on urban train services and at urban stations;
 - 12.2. Undertake revenue protection inspections of passenger's tickets...;
 - 12.3. Provide ad-hoc additional security services at train facilities to ensure the safety and security of passengers and facilities"
 and who "will be expected to conduct themselves in a friendly and courteous manner at all times when dealing with passengers...".
 13. The services which MSS has contracted to provide "includes all incidental and ancillary services" to those specifically agreed to in the scope of services, and the MSS has also agreed that the respondent's authorised representative "may order any variation to the scope, timing, form, quality or quantity of the Services which in ...(his) opinion is necessary...".

Evidence

- 5 The parties relied on some of the evidence given by Mr Jesse Watts, Mr Williamjeet Singh, Mr Jason Britza, Ms Tracey Flavel, Mr Barry Watts and Mr Ian Luff at the hearing at first instance. They gave evidence about the duties undertaken by MSS contractors at the Station on the afternoon shift, past rostering practices at the Station, roster flexibility and costs related to rostering PTAs and MSS contractors on the Armadale line (see exhibit PTA 1, tabs 3 to 8).
- 6 Mr John Kitis gave evidence by witness statement on behalf of the respondent (exhibit PTA 1, tab 12). Mr Kitis has been the respondent's Transit Manager in the Security Service Section of the Transperth Train Operations Division since 2002. One of his responsibilities is to oversee rostering on Transperth's urban rail system and he makes operational decisions about where and when to allocate personnel. Personnel are deployed at stations for multiple reasons including assisting passenger safety and security, minimising fare evasion and providing assistance and information to passengers. Personnel available to the Security Service Section include Transit Officers (TOs) employed by the respondent and Revenue Protection Officers employed by MSS whose duties do not involve passenger security other than providing a physical presence. After all available TOs have been rostered for work MSS is notified about the rostered shifts required to be filled by Revenue Protection Officers.
- 7 Up to 3.00 pm on weekdays the role of the Security Service Section on the urban rail network is to provide mobile TO patrols in 'Delta' vehicles to respond to passenger and employee safety and security issues as well as the provision of train-riding personnel which is currently undertaken by Revenue Protection Officers. Up to 3.00 pm on weekdays deterrence of fare evasion and the provision of passenger assistance at stations are provided by staff controlled by the respondent's Customer Service Section. From 3.00 pm the Security Service Section is responsible for the deterrence of fare evasion, provision of passenger assistance at stations and safety and security.
- 8 Transit Officers are rostered at major stations across the network during and after the afternoon peak to provide security. Revenue Protection Officers cease train-riding during the afternoon peak to staff station fare gates until about 6.00 pm and those rostered after 6.00 pm then resume train-riding. The current staffing arrangements at the Station are consistent with this approach.
- 9 MSS Revenue Protection Officers are required to work on the afternoon shift and MSS decides whether that work schedule is filled by a single pair of officers otherwise engaged on a train-riding shift starting at 10.00 am and finishing after 5.30 pm or by two MSS employees finishing an early morning train-riding shift and another pair commencing a late night train-riding shift. Previously TOs worked in the morning and evening at the Station. When a new station was built at Victoria Park in July 2008 TOs and MSS contractors took over from Customer Service Assistants after 3.00 pm.
- 10 MSS contractors either commence their shifts at 5:30 am, 9.00 am or 3.00 pm and they work between eight to 10 hours each shift. On Fridays and Saturdays when the respondent operates extended train services, PTAs work longer shifts to cover these additional hours. Peak times on trains on weekdays are between 3.00 pm and 6.00 pm. During this time MSS contractors cease train-riding duties and are allocated other tasks such as attending to fare gates.
- 11 MSS contractors report to their own supervisors and the respondent's Transit Supervisors can give instructions to MSS supervisors. The respondent has different supervisors of its security division and customer service division. Passenger Service

Managers oversee customer service employees including PTAs and Transit Supervisors oversee MSS contractors and TOs. If PTAs were rostered to work at the Station between 3.00 pm and 5.00 pm they would report to the Transit Supervisor.

- 12 Mr Kitis has the authority to raise complaints about MSS contractors with MSS and he could not recall any complaints being made about MSS contractors working at the Station. Mr Kitis is delegated to deal with issues related to the MSS contract and he stated that no order has issued to expand the scope of this contract.
- 13 There is no cost saving to the respondent to have MSS contractors removed from working the afternoon shift at the Station as MSS contractors are required to work their full shift and they would be reallocated to complete other work as required by the respondent. This is so because MSS contractors work a guaranteed number of hours. Mr Kitis was unaware of any cost differences if PTAs were employed at the Station on the afternoon shift instead of MSS contractors. Mr Kitis stated that the duties undertaken by MSS contractors and the duties of a PTA at the Station working the afternoon shift would essentially be the same. If MSS contractors were not used at the Station on the afternoon shift a TO would have to be rostered at the Station. As there is currently a shortage of TOs the respondent would have to take a TO from another station which would be difficult as the afternoon is the peak time at train stations.

Submissions

Applicant

- 14 The respondent is managing its business in an unfair or unjust manner by not rostering PTAs to work the afternoon shift at the Station.
- 15 The applicant argues that the following objects of the Act are compromised if MSS contractors work the afternoon shift at the Station:
- i. promoting goodwill in industry and in enterprises within industry (s 6(a));
 - ii. promoting collective bargaining (s 6(ad)); and
 - iii. facilitating the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises (s 6(af)).

(Exhibit PTA 1, tab 1)

Goodwill is not promoted as the work PTAs normally undertake is being allocated to a different classification of employee and it is unfair to have a different classification of employee undertake the work normally performed by PTAs. A large part of a PTA's role at the Station is to provide customer service to special needs patrons who use that facility and the work performed by MSS contractors at the Station on the afternoon shift is identical to the work that is normally performed by PTAs at the Station between 7.00 am and 3.00 pm. Collective bargaining and fairness to employees is undermined because two different categories of employees are paid different rates of pay to undertake the same work.

- 16 The respondent could extend PTAs' shifts at the Station. Ms Flavel said that the extended hours at the Station could be factored into the roster without the payment of overtime and PTAs working on the Armadale line are happy to extend their shift at the Station to instead finish at 4.45 pm. The applicant maintains that there is no detriment to the respondent having PTAs work the afternoon shift at the Station as the duties undertaken by MSS contractors during this period are essentially the same duties performed by PTAs throughout the day. Furthermore PTAs used to work 10 hour shifts at the Station.
- 17 Customer service duties undertaken by MSS contractors at the Station on the afternoon shift are outside of the scope of the work contained in the contract between the respondent and MSS (see PTA 1, tab 11, schedule 9). This contract provides that the respondent engages MSS to cover a shortage of TOs and MSS contractors were not engaged to fill or supplement PTA positions, roles or duties. As there is no shortage of employees who work in the respondent's customer service division there is no operational need for the respondent to engage MSS contractors to perform customer service duties. The work the respondent requires to be undertaken at the Station on the afternoon shift is not casual guard security services, revenue protection work or customer service work that is 'incidental' or 'ancillary' to their main duties. This work primarily involves customer service so it is not work that should be allocated to MSS contractors.
- 18 The applicant claims that it is cheaper for the respondent to use PTAs at the Station on the afternoon shift than MSS contractors. Additionally, MSS contractors are paid a lower hourly rate than PTAs despite the fact that they are performing the same job. No evidence was given by the respondent that it would be not be cheaper to have PTAs working the afternoon shift at the Station (see *Jones v Dunkel* (1959) 101 CLR 298). If PTAs were rostered to work at the Station on the afternoon shift MSS contractors would be redeployed elsewhere so there is no detriment to the respondent to move MSS contractors off the afternoon shift at the Station. Extending PTA shifts at the Station to 10 hours could be covered by placing the PTAs working at the Station on the spare lincs contained in the PTA roster. There would therefore be no need to pay PTAs at overtime rates.
- 19 The applicant does not accept that changeover and reporting issues arising if PTAs work after 3.00 pm at the Station are reasons not to grant the orders sought under this application. There was also no evidence that if this application is granted there would be ramifications in the future in relation to other issues between the parties as claimed by the respondent.

Respondent

- 20 Management's right to manage is not to be lightly interfered with where there has been no unfairness or injustice demonstrated in its exercise. The Commission should not interfere with the respondent's decision to roster MSS contractors to work at the Station on the afternoon shift even though the duties they undertake are similar to the work undertaken by PTAs. The respondent has made this decision to organise its work in the way it has for good reason.
- 21 The respondent's decision to have MSS contractors work the afternoon shift at the Station is reasonable as these personnel are meeting the respondent's operational requirements at that place and time. The respondent's decision not to roster PTAs on 10 hour shifts from 7.00 am to 5.00 pm on weekdays at the Station is consistent with the long established customer service model which divides responsibility for staffing stations and supervising those staff between the Customer Service Branch up

until 3.00 pm and the Security Services Branch after 3.00 pm. Under the customer service model introduced in late 2006 customer service employees, which includes PTAs and customer service assistants, are generally rostered on the suburban line stations up to 3.00 pm. From 3.00 pm staff provided by the Security Service Branch and supervised by their shift commanders take over. Rostering customer service staff at the Station after 3.00 pm would complicate that handover of responsibility between these branches and it is clearer and simpler to have a 3.00 pm changeover with security staff as opposed to PTAs. Even if the allocation of the work after 3.00 pm at the Station to PTAs was not inconsistent with the respondent's customer service model, the respondent's decision not to roster PTAs on 10 hour shifts from 7.00 am to 5.00 pm on weekdays has not been demonstrated to be unreasonable or unfair having regard to the respondent's operational priorities. Providing a station presence for two hours between 2.45 pm and 4.45 pm at the Station on weekdays is not a full-time role and it is achieved by allocating personnel who would otherwise undertake other duties for 10 hours of each week.

- 22 Whilst the duties undertaken by MSS contractors and PTAs at the Station are almost the same the respondent's operational needs are important and the change as proposed by the applicant would require new management processes and new handover procedures in relation to customer service supervisors and security supervisors. The respondent maintains that it is simpler to have MSS contractors working under the security branch to start their shift at 3.00 pm at the Station. This is at the beginning of the afternoon peak and it sits with the roster line and security staff rosters. Transit Officers do a 10 hour shift from 3.00 pm to 1.00 am. They start at 5.00 am and do a 10 hour shift and finish at 3.00 pm, in line with the respondent's customer service model.
- 23 MSS employees are not replacing PTAs who have previously performed this work or taking work away from them. PTAs have not been rostered at the Station after 3.00 pm on weekdays since at least 2008. Before September 2006 Security Services Branch had full responsibility for staffing and supervising the Station and from about September 2006 the respondent began rostering PTAs at the Station from morning though to 3.00 pm on weekdays with the Security Services Branch retaining responsibility for staffing and supervising the Station after 3.00 pm.
- 24 The respondent acknowledges that whoever is rostered to be present between 7.00 am and 5.00 pm at the Station would typically undertake similar activities whether the employee was a PTA, a TO or personnel provided under the MSS contract. The operational requirements between 7.00 am and 5.00 pm at the Station justifying a presence at the Station relates to its use by visually impaired patrons attending the nearby Perron Centre. Whoever is rostered during these times is expected to monitor the safety of visually impaired patrons and assist them where requested to use the respondent's rail services and facilities. They would also be expected to deal with any other revenue protection issues or customer assistance requests which were within their competence. No demarcation issue could arise if the personnel allocated to work the afternoon shift at the Station were TOs as this work is the work of a TO and a PTA. A TO can be required to ensure passenger safety and provide assistance to passengers and a TO's core duties include providing a full range of customer service assistance.
- 25 The respondent does not accept that MSS contractors are undertaking duties beyond the scope of the MSS contract. Any contract interpretation issues are a matter between the parties to the contract and the contract can be varied by the respondent if necessary. The respondent does not believe that the scope of the contract has been breached and nor has there been the need to vary the scope as provided for in the contract. It is a matter for the parties to the contract if the contract terms have not been met.
- 26 There will be no direct saving to the respondent by reallocating the work undertaken on the afternoon shift at the Station to PTAs. The cost of allocating the current personnel to this shift is assessed by management with reference to the value of the work those personnel would otherwise be performing. Under the current arrangements the respondent foregoes two hours of daytime train-riding each weekday by each of two MSS contractors, rather than 10 hours currently rostered for other identified priorities which includes availability for relief on the Armadale PTA weekly roster. The respondent maintains that rostering MSS contractors and not PTAs at the Station is not about cost. It concerns the allocation of priorities. The simplicity and clarity of the handover arrangements are important as is consistency with the long-established customer service model which divides responsibility for staffing stations and supervising staff. The respondent relies on the evidence of Mr Kitis that MSS contractors work set shifts. Even if there was a greater cost to the respondent to have MSS contractors work at the Station on the afternoon shift this is not an issue that the respondent is concerned about and if there was any cost differential it would be very small. Allocating personnel to stations and in line with organisational processes is a higher priority than savings. Furthermore, if PTAs were used instead of MSS contractors to work the afternoon shift at the Station this would have to be covered by using PTAs from another line on the roster which would create a shortfall elsewhere.
- 27 A lack of detriment does not make management's decision unfair and the Commission should not intervene in management's right to manage lightly. Changing this model or roster would be unsettling as it has been in place since 2006 and it could lead to the applicant agitating for other changes. The work fits with the respondent's roster and duties undertaken by other employees such as fare gate duties.

Consideration

Witness credit

- 28 I listened carefully to the evidence given by Mr Kitis. In my view he gave his evidence honestly and to the best of his recollection. I therefore accept his evidence.
- 29 The principle of management's prerogative to manage is not to be lightly interfered with. An employer has the prerogative to organise its business in the way it sees fit and the Commission should not interfere in an employer's decision unless the decision can be said to be industrially unfair (see *Amalgamated Metal Workers and Shipwrights Union of Western Australia v Australian Shipbuilding Industries (WA) Pty Ltd* (1987) 67 WAIG 733). The Commission in Court Session said in the *Federated Engine Drivers' and Firemen's Union of Workers of Western Australia v Robe River Iron Associates* (1987) 67 WAIG 763 '[m]anagerial prerogative is not a sword which can be wielded in wanton disregard of the industrial consequences nor is it a shield to hide behind. An employer has a responsibility to manage fairly' (766).

- 30 I have carefully considered the evidence given in the previous proceeding relied on by the parties, the evidence of Mr Kitis, exhibits relied on by the parties and the submissions of both parties. I take into account the terms of s 26(1)(a) of the Act, relevant objects of the Act and the requirement on the Commission to recognise an employer's right to manage and that an employer's decision making is to be done fairly. I find in all of the circumstances of this case that it is not appropriate for the Commission to overturn the respondent's decision to roster MSS contractors instead of PTAs on the afternoon shift at the Station. I therefore decline to issue the orders sought by the applicant.
- 31 I find that the respondent's practice of rostering MSS contractors at the Station on the afternoon shift should continue as it is in accord with the current rostering pattern on the Armadale line and the operation of the respondent's supervisory reporting model. If PTAs are rostered on the afternoon shift at the Station instead of MSS contractors this will be outside of the existing PTA rostering structure on the Armadale line. Currently all but six PTA shifts on this line finish at 3.00 pm and PTA shifts finishing after 3.00 pm are only in place because of the extended train services the respondent provides on the Armadale line on Friday evenings. I also accept the respondent's claim that even though it is possible to roster PTAs to work the afternoon shift at the Station this will impact on the availability of PTAs to be rostered elsewhere on the Armadale line. Rostering MSS contractors at the Station synchronises with the respondent's current supervisory structure whereby PTAs report to a customer service supervisor up to 3.00 pm on weekdays and TOs and MSS contractors report to a security supervisor. If PTA shifts are extended to cover the afternoon shift at the Station the current supervisory line of reporting would have to be modified and separate overlapping arrangements made. I find that any alteration to the current reporting procedures is undesirable as it will disrupt the existing streamlined arrangements.
- 32 I find that it is reasonable for the respondent to continue rostering MSS contractors on the afternoon shift at the Station even though MSS contractors undertake virtually the same duties as PTAs at the Station. I find that the duties performed by MSS contractors on the afternoon shift at the Station are contemplated in the TO Job Description Form which includes providing 'assistance and information to passengers in a friendly and professional manner'. I also note that MSS contractors working at the Station are not displacing the employment of PTAs as there was no evidence that rostering MSS contractors on the afternoon shift at the Station has resulted in a reduction in the number of PTAs required by the respondent. Additionally, PTAs have not been rostered to work on the afternoon shift at the Station for several years.
- 33 I find that the applicant has not demonstrated that it will be cheaper for the respondent to roster PTAs on the afternoon shift at the Station instead of MSS contractors. Mr Kitis gave evidence that MSS would continue to be paid for the hours normally worked by MSS contractors on the afternoon shift at the Station as these contractors would be deployed elsewhere for these hours under the respondent's staffing arrangement with MSS. There will not be any savings to the respondent if PTAs are rostered to work this shift as the respondent will be paying PTAs and MSS contractors deployed to work elsewhere for these hours. Mr Kitis also gave evidence that if PTAs were rostered to work on the afternoon shift at the Station there would be a further cost to the respondent of rostering a TO to work on the afternoon shift at the Station.
- 34 I reject the applicant's claim that the respondent and MSS are in breach of their contract to provide security personnel to the respondent when MSS contractors undertake PTA duties. Having considered the terms of the contract it is my view that the duties performed by MSS contractors on the afternoon shift at the Station are contemplated by some of the objectives contained in the Scope of Services as well as the training requirements of MSS contractors which in my view align with the duties required to be performed by MSS contractors at the Station.
- 35 Schedule 9 of the contract, in part, reads as follows:
- 3 Transperth trains Revenue Protection and Casual Guard Security Services**
- 3.1 Scope of Services**
- 3.1.1 General Service Objectives
- ...
- a) Provide a physical security presence on urban train services and at urban train stations;
- ...
- i) Provide ad-hoc additional security services at train facilities to ensure the safety and security of passengers and facilities, as requested by the PTA.
- At Clause 3.5. - Training and Assessment of schedule 9, MSS contractors are required to undertake two and a half days of customer service/conflict resolution training, a half day of safety and reporting training and a half day of disability awareness training.
- 36 I also note the respondent's submission that the respondent and MSS are satisfied that the terms of this contract are not being breached when MSS contractors undertake PTA duties at the Station and there was no evidence presented at the hearing of any disputes between the respondent and MSS over the interpretation of the terms of the contract.
- 37 I am satisfied that the retention of the current arrangement of having MSS contractors work the afternoon shift at the Station, which has been in place for a lengthy period, does not offend or undermine the promotion of goodwill and collective bargaining as there was no evidence given at the hearing in support of the applicant's claim that these objects of the Act have been compromised by having MSS contractors working the afternoon shift at the Station. I also find that the retention of the current arrangement whereby MSS contractors work the afternoon shift at the Station provides for the efficient organisation and performance of the respondent's work when balanced with fairness towards relevant employees.
- 38 In the circumstances I am not satisfied that there has been any unfairness or injustice demonstrated in the exercise of the respondent's managerial discretion with respect to this dispute.
- 39 An order will issue dismissing this application.
-

2015 WAIRC 00450

DISPUTE RE ROSTERING PRACTICES

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

PARTIES

THE AUSTRALIAN RAIL, TRAM AND BUS INDUSTRY UNION OF EMPLOYEES, WEST AUSTRALIAN BRANCH

APPLICANT

-v-

PUBLIC TRANSPORT AUTHORITY OF WESTERN AUSTRALIA

RESPONDENT**CORAM** COMMISSIONER J L HARRISON**DATE** FRIDAY, 19 JUNE 2015**FILE NO/S** CR 29 OF 2012**CITATION NO.** 2015 WAIRC 00450**Result** Application dismissed**Representation****Applicant** Mr C Fogliani (of counsel) and Mr K Singh**Respondent** Mr R Farrell (of counsel)*Order*

HAVING HEARD Mr C Fogliani of counsel and Mr K Singh on behalf of the applicant and Mr R Farrell of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby orders –

THAT the application be and is hereby dismissed.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2015 WAIRC 00493

DISPUTE RE ALLEGED REQUIREMENTS IMPOSED ON TEACHERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION : 2015 WAIRC 00493
CORAM : ACTING SENIOR COMMISSIONER P E SCOTT
HEARD : WRITTEN SUBMISSIONS MONDAY, 22 JUNE 2015, THURSDAY, 25 JUNE 2015
DELIVERED : TUESDAY, 7 JULY 2015
FILE NO. : CR 15 OF 2014
BETWEEN : THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)
 Applicant
 AND
 THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION
 Respondent

CatchWords : Matter Referred for Hearing and Determination pursuant to s 44 – Application for an extension of time in which to file witness statements – Minimum reporting requirements on teachers in student reports – Workload – Change in representation – Conduct of the parties and their representatives – Prejudice to the parties – Deterioration of industrial relations – Objects and requirements of the *Industrial Relations Act 1979*

Legislation : *Industrial Relations Act 1979* s 6, s 26(1), s 27(1)(a), s 27(1)(c), s 31(3), s 44

Result : Application for an extension of time in which to file witness statements granted

Representation:

Applicant : Mr M Amati

Respondent : Mr R Bathurst of counsel

*Reasons for Decision***Background**

1 The dispute between the parties is about the minimum reporting requirements placed on teachers in the preparation of student reports to parents and the degree of commentary required in respect of each subject for each student. The reports are provided at the middle and end of each year. It is an issue about workload.

- 2 The issue of reporting requirements was the subject of a dispute and subsequent agreement between the parties in 2009, and has arisen as a dispute on a number of occasions since as departmental policies and curriculum changes have occurred over the years. It seems to subside as an issue once each reporting period passes and arise again with the next reporting period.
- 3 The issue arose again in the first half of 2014 with the applicant filing an application for a conference pursuant to s 44 of the *Industrial Relations Act 1979* (the Act), on 20 May 2014. The schedule to the application sought conciliation of:
 - a dispute relating to the capricious intimidation and undue coercion by the respondent, including the Principal of Vasse Primary School ... of a number of employees of the respondent and members of the applicant; consisting of attempting to force teachers at the school to change the manner in which they have to report to parents students' progress for Semester 1, 2014.
- 4 During the course of conciliation, it has become clear that the issue goes beyond concerns raised at one primary school, and involves a deep seated dispute between the parties.
- 5 A number of conferences were convened over the last year. At the first, on 22 May 2014, the applicant was represented by its industrial advocate. A further conference was convened on 22 July 2014. At this conference, the applicant was again represented by its industrial advocate and at this stage the parties discussed that a matter, broader in scope than the original application, would need to be referred for hearing and determination as agreement could not be reached. The process for referral of the matter and setting of dates for hearing was discussed both at the conference and in subsequent correspondence.
- 6 By 6 August 2014, the respondent was represented by counsel. The parties again engaged in private discussions with a view to resolving the matter.
- 7 By 24 October 2014, the parties advised the Commission that those discussions had resulted in an agreement to resolve the immediate situation but not about how the issue in dispute would be dealt with in the future.
- 8 On 11 December 2014, the respondent's counsel wrote to the Commission seeking that the matter be dismissed under s 27(1)(a) of the Act, asserting that the relevant policy, the subject of the dispute, was about to be changed and the documents said to be the basis of the dispute would no longer have any effect.
- 9 On 17 December 2014, the applicant responded rejecting the respondent's assertion and saying that there was still a live dispute.
- 10 The Commission proposed to convene a conference to deal with the respondent's application to dismiss. From this point, the applicant notified the Commission that it was to be represented by counsel in the absence of the applicant's industrial advocate.
- 11 The Commission convened a conference on 5 February 2015, at which time it was resolved that the matter would be referred for hearing and determination and a number of procedural issues were programmed. They included:
 1. That the applicant would file and serve any witness statements and documents upon which it intended to rely by 2 April 2015; and
 2. The respondent would file and serve any witness statements and documents upon which it intended to rely by 24 April 2015.
- 12 The parties were of the view that a further conciliation and scheduling conference may be of assistance, so one was to be listed for 4 May 2015.
- 13 By 2 April 2015, the date upon which the applicant was to have filed any witness statements and documents, none were filed.
- 14 On 14 April 2015, the applicant advised that it had chosen not to file witness statements and filed a small bundle of 16 documents.
- 15 In light of the applicant filing its documents late, the applicant did not object to the respondent having an extension of time to file its witness statements, to 1 May 2015.
- 16 On 30 April 2015, the respondent filed four lengthy witness statements with attachments, comprising three large and two smaller volumes.
- 17 On 4 May 2015, the Commission convened a further conference for conciliation and scheduling purposes. At this conference, the applicant was represented by counsel and by its industrial advocate. Counsel for the applicant advised that the applicant had chosen not to file witness statements at this stage as the documents filed spoke for themselves, however, he reserved the right to file witness statements at a later stage. The conference concluded on the basis that the applicant would file a further revised schedule and any evidence by Friday, 15 May 2015 and the respondent would file a response by 21 May 2015. Other programming matters were discussed.
- 18 At that conference, the respondent's counsel said the respondent was keen to proceed to hearing and determination because the dispute was again becoming a live issue as union representatives at high schools were advising members about reporting requirements in a way which conflicted with the respondent's views.
- 19 By email dated 14 May 2015, the applicant's counsel notified the Commission, amongst other things, of the following:

Having considered its position following the registration of the new Agreement, the Applicant seeks leave to discontinue the current application. This is done without prejudice to any future claim that the union may wish to bring on the issue of assessment and reporting, subject to compliance with the dispute resolution procedure in the Agreement, and the Act.
- 20 On 3 June 2015 the respondent advised that it was prepared to consent to the discontinuance on certain conditions which related to how future issues would be dealt with.
- 21 The Commission listed the matter for a directions hearing on 15 June 2015 and after a brief hearing adjourned into conference. At this stage, the applicant was no longer represented by counsel but by its industrial officer alone. At that conference, the

applicant said it could not agree to the terms specified by the respondent for the discontinuance of the application and now wanted to proceed to hearing. The industrial advocate also advised that the applicant now wished to file witness statements. The respondent objected to the applicant now having a further opportunity to file witness statements. Having heard from the parties during conference, I denied the applicant's request to now file witness statements on the basis that it had had two previous opportunities to do so and had expressly indicated that it would not do so but would rely on its documents. It was bound by the conduct of its then representatives.

22 On 22 June 2015, the applicant filed a Submission to Extend Time for Filing Witness Statements.

The applicant's case

23 The applicant acknowledges that it made an oral application in the conference on 15 June 2015 to allow it further time to file witness statements and that the application had been refused. The applicant says this refusal will mean that the application will be heard and determined exclusively on the evidence tendered by the respondent, a situation the applicant says will be highly disadvantageous to it and will prejudice its ability to submit evidence proving its case, and would work an injustice on its interests. It says that the Commission ought to exercise its discretion to allow the applicant an extension of time.

24 The applicant acknowledges that it has twice missed the time limits for filing witness statements and says that the delay has been due to the discontinuity of representation in the proceedings in circumstances beyond the strict control of the applicant. It concedes that a party is bound by the acts of its representatives but submits that it is still a relevant consideration in ascertaining that the delay has not been the direct fault of the applicant's diligence to progress the matter.

25 The applicant also submits that an important factor is that the matter is of significance to it and its members and has the real potential to escalate and consequently for the deterioration of industrial relations between the parties should the matter be resolved without the applicant having an opportunity to put evidence which might assist in the determination of the matter.

26 It also says that except for delay, there is no prejudice to the respondent by an extension of time being granted, and it contrasts the current situation with a failure to file an application or an appeal within the statutory limits and suggests that the matter should be dealt with in a manner similar to a failure to comply with rules.

The respondent's case

27 The respondent says that the applicant was at all relevant times represented by experienced legal counsel and was required to file its witness statements by 2 April 2015; it deliberately decided not to file any witness statements but instead filed a bundle of documents on 14 April 2015 as its evidence. The respondent notes that she filed her witness statements on 30 April 2015 and that at the conference on 4 May 2015, the applicant was given until 15 May 2015 to decide whether it wished to file an amended application and to file any further evidence.

28 The respondent says that it can be inferred from the conduct of the applicant on 14 May 2015, seeking leave of the Commission to discontinue the matter, that the applicant made a deliberate decision not to file an amended application or any further evidence based on its assessment of the strength of its own case. The respondent then put to the applicant terms on which the respondent was prepared to consent to the matter being discontinued. The respondent notes that on 15 June 2015, the applicant's legal representative ceased to act for the applicant, and at that point the applicant indicated that it wanted to progress the matter to hearing and applied to file further evidence.

29 The respondent says that with the Commission having decided at conference on 15 June 2015 that the applicant would not have the opportunity to file further evidence, the proper course for the applicant, if not satisfied with that decision, is to lodge an appeal, which it has chosen not to do. The respondent says that the applicant is bound by the conduct of its legal representatives. The respondent will be put to further expense if it is necessary to respond to that evidence and that the ongoing industrial dispute regarding reporting and allowing further evidence to be adduced may delay the resolution of the matter, and particularly in the absence of any clear indication from the applicant as to the precise nature and relevance of the evidence it now seeks to put forward, leave to file further evidence should not be granted.

Consideration and conclusions

30 A number of points need to be considered in this matter. They relate to the conduct of the parties and their representatives, but more significantly they relate to the objects of the Act and to the industrial relationship.

31 In respect of the first issue, a party is bound by the conduct of its representatives (s 31(3) of the Act), and this is so particularly when it is represented by counsel. It may determine a strategy and approach to the issues which, in this case, means that it chooses not to call evidence but to rely on the meanings of documents which ought to be clear on their face. This is what the applicant did in deciding on two occasions not to file witness statements when it had the opportunity.

32 I think it is important to note that the applicant has not, as it submits, twice missed the time limits for filing. Rather, it has consciously and strategically chosen not to file witness statements. It was not through error or inadvertence. Secondly, it was not due to a discontinuity of representation beyond the strict control of the applicant. It was entirely within the control of the applicant, an organisation which is well resourced and has professional and experienced representatives within its ranks and would be unlikely to hand over all decision-making about its case to its legal representatives without providing proper instructions. Once again, it was a conscious and strategic decision.

33 A party is to be afforded a reasonable, but not unlimited, opportunity to be heard, nor is it required to take advantage of the opportunity (*Sullivan v Department of Transport* (1978) 20 ALR 323 at 343; 1 ALD 383 at 403 per Deane J). However, it should not change its mind about the way it intends to conduct its case, and as a consequence cause delay, inconvenience and cost to the other party and to the Commission. This is particularly so in a jurisdiction where costs are generally not available and costs for the services of a legal practitioner or agent are not available at all (s 27(1)(c) of the Act).

- 34 If those matters of delay, inconvenience and cost were the only relevant considerations, I would have no hesitation in again refusing the application to extend time to file witness statements. However, they are not the only considerations. Central to the Commission's role is the prevention and resolution of conflict in respect of industrial matters (the long title of the Act).
- 35 The principal objects of the Act include:
- (a) to promote goodwill in industry and in enterprises within industry; and
 - ...
 - (af) to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises; and
 - (ag) to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises within industry and the employees in those enterprises; and
 - (b) to encourage, and provide means for, conciliation with a view to amicable agreement, thereby preventing and settling industrial disputes; and
 - (c) to provide means for preventing and settling industrial disputes not resolved by amicable agreement, including threatened, impending and probable industrial disputes, with the maximum of expedition and the minimum of legal form and technicality; and
 - (ca) to provide a system of fair wages and conditions of employment; and
 - ...
- Industrial Relations Act 1979 s 6*
- 36 Section 26(1) of the Act provides:
- In the exercise of its jurisdiction under this Act the Commission —
- (a) shall act according to equity, good conscience, and the substantial merits of the case without regard to technicalities or legal forms; and
 - (b) shall not be bound by any rules of evidence, but may inform itself on any matter in such a way as it thinks just; and
 - (c) shall have regard for the interests of the persons immediately concerned whether directly affected or not and, where appropriate, for the interests of the community as a whole; and
 - (d) shall take into consideration to the extent that it is relevant —
 - ...
 - (vi) the need to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises;
 - (vii) the need to encourage employers, employees and organisations to reach agreements appropriate to the needs of enterprises and the employees in those enterprises.
- 37 Therefore, the promotion of goodwill in industry and the resolution of industrial disputes must have primacy. It is to be achieved with minimal reliance on technicalities and legal forms.
- 38 In applying the provisions of the Act, I am very conscious of this dispute having a long history and of the recurrence of the issue. Both sides want the matter determined so as to resolve an issue which keeps arising at school level. It causes conflict between teachers and their school administrators. As noted earlier, it is an issue about workload.
- 39 If I were to take a technical approach I would, without hesitation, again refuse the application for the applicant to have a further opportunity to file any witness statements. It is also reasonable to suggest that having made this application once in conference and been refused, that it is an abuse of process for the applicant to then simply file a submission seeking reconsideration of the issue within a week of its initial refusal and without there being any changed circumstances. But to refuse the application would deny the opportunity for all issues to be ventilated and considered in the determination of the matter and, if the applicant is unsuccessful, set the stage for further disputation at school level by those teachers who might say their union did not have an opportunity to fully ventilate their case. The fact that it was because of the applicant's choice as to how it conducted its case, or due to the failure of their union to meet its obligations, would not resolve the dispute and will not lessen the sense of conflict. The issue is bound to arise again.
- 40 Therefore I conclude that the requirements of the Act for the Commission to act without regard to technicalities and legal form, and with its object of the resolution of the dispute between the parties, particularly those with an ongoing industrial relationship, means the applicant should have a further opportunity to file any witness statements on which it intends to rely, as being the whole of the evidence in chief of those witnesses. Should the respondent be required to incur further costs as a result, not being the costs for the services of a legal practitioner or agent, it may apply to the Commission.
- 41 The matter is listed to be heard on 13 and 14 August 2015. In the circumstances, the applicant is to file those witness statements within 14 days of today's date. I note that 14 days is a greater period than it sought in the conference of 4 May 2015.
-

2015 WAIRC 00494

DISPUTE RE ALLEGED REQUIREMENTS IMPOSED ON TEACHERS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

THE STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

PARTIES**APPLICANT**

-v-

THE DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT**CORAM** ACTING SENIOR COMMISSIONER P E SCOTT**DATE** TUESDAY, 7 JULY 2015**FILE NO/S** CR 15 OF 2014**CITATION NO.** 2015 WAIRC 00494**Result** Application for an extension of time in which to file witness statements granted*Order*

HAVING heard from Mr M Amati on behalf of the applicant and Mr R Bathurst of counsel on behalf of the respondent, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

1. THAT the application for an extension of time in which to file witness statements is granted.
2. THAT the applicant file and serve any witness statements on which it intends to rely by Wednesday, 22 July 2015.

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

[L.S.]

CONFERENCES—Notation of—

Parties	Commissioner	Conference Number	Dates	Matter	Result	
Australian Medical Association (WA) Incorporated	Department of Health	Scott A/SC	PSAC 9/2015	23/04/2015	Dispute re allowances	Discontinued
Health Services Union of Western Australia (Union of Workers)	Minister for Health The Minister for Health is incorporated as the WA Country Health Service under section 7 of the Hospitals and Health Services Act 1927 (WA) and has delegated all the powers and duties as such to the Chief Executive Officer of the Department of Health, known as the Director General of Health	Scott A/SC	PSAC 24/2014	6/10/2014	Dispute re treatment of union member	Discontinued
Health Services Union of Western Australia (Union of Workers)	The Director General of Health as delegate of the Minister of Health in His incorporated capacity under section 7 of the Hospitals and Health Services Act 1927 (WA)	Scott A/SC	PSAC 5/2015	6/02/2015 24/02/2015 6/03/2015 12/03/2015 20/03/2015	Dispute re security staffing levels	Discontinued
The Australian Rail, Tram and Bus Industry Union of Employees, West Australian Branch	Public Transport Authority of Western Australia	Kenner C	C 5/2015	8/05/2015	Dispute re demotion of employee due to alleged breach of discipline	Discontinued

PROCEDURAL DIRECTIONS AND ORDERS—**2015 WAIRC 00472**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION DR MARK GRANITTO	APPLICANT
	-v- RSC DENTAL PTY LTD T/AS KEYS DENTAL CENTRE	RESPONDENT
CORAM	ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	MONDAY, 29 JUNE 2015	
FILE NO.	B 29 OF 2015	
CITATION NO.	2015 WAIRC 00472	

Result	Directions issued
Representation	
Applicant	Mr S Millman of counsel
Respondent	Mr B Jackson of counsel

Direction

WHEREAS this is an application pursuant to Section 29(1)(b)(i) of the *Industrial Relations Act 1979*; and
 WHEREAS the application was set down for a Directions hearing on the 23rd day of June 2015; and
 WHEREAS the Commission is of the opinion that the issuing of the Directions will assist in the conduct of the hearing of the matter;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs:

1. THAT the matter be listed for a 5 day hearing in October or November 2015.
2. THAT the applicant file and serve any witness statements together with any documents, constituting the whole of the evidence in chief of the witnesses upon which he intends to rely 8 weeks prior to the date of the hearing.
3. THAT the respondent file and serve any witness statements together with any documents, constituting the whole of the evidence in chief of the witnesses upon which it intends to rely 5 weeks prior to the date of the hearing.
4. THAT the applicant file and serve an Outline of Submissions no later than 3 weeks prior to the date of the hearing.
5. THAT the respondent file and serve an Outline of Submissions no later than 2 weeks prior to the date of the hearing.
6. THAT there be liberty to apply.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.**2015 WAIRC 00483**

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION JASON ZHOU	APPLICANT
	-v- CURTIN UNIVERSITY	RESPONDENT
CORAM	COMMISSIONER J L HARRISON	
DATE	THURSDAY, 2 JULY 2015	
FILE NO/S	B 58 OF 2015	
CITATION NO.	2015 WAIRC 00483	

Result	Order issued
Representation	
Applicant	In person
Respondent	Ms J van den Herik

Order

This is an application under s 29(1)(b)(ii) of the *Industrial Relations Act 1979* (the Act).

The applicant did not include details about the benefits he was seeking and the basis for seeking these benefits in his application.

After a section 32 conference was held on 15 June 2015, with the applicant being assisted by a Mandarin interpreter, the applicant was required to provide the following information:

By no later than 4.00 pm Monday 29 June 2015 Mr Zhou is to email the Commission, with a copy to the respondent's representative Ms van den Herik, the following information in relation to his claims for the period Mr Zhou says he was an employee of Curtin University between 2005 and 2015.

- A. 1. Mr Zhou is to specify the amount he is due to be paid and the dates these claims cover, specified on a yearly basis, for each of the following:
 - a. Wages;
 - b. Annual Leave;
 - c. Superannuation; and
 - d. Sick leave.
- 2. The amount of Medical expenses being claimed for each item.
- B. Mr Zhou is to provide documents confirming his employment with Curtin University for the period 2005 to 2015. Mr Zhou is also required to provide written confirmation of his terms and conditions of employment with Curtin University throughout this period.

After receiving this information Curtin University has 14 days to provide a further response to Mr Zhou's claims.

The Commission will then consider how to proceed further with this application.

On 29 June 2015 the applicant provided the following information by email, which was not sent to the respondent:

I was sick for a while and I am send you a letter from Curtin University back to 2005.

- A. 1. Mr Zhou is to specify the amount he is due to be paid and the dates these claims cover, specified on a yearly basis, for each of the following:
 - a. Wages; AUD 80000 * 10 Years
 - b. Annual Leave; No annual leave and almost travel 7 days a week for exhibitions for Curtin
 - c. Superannuation; and Uni Super
 - d. Sick leave. Need to be adviced By doctor, as work for Australia organization, no super be paid overseas, so no doctor treatment overseas in the system
- 2. The amount of Medical expenses being claimed for each item.
Need to be adviced by doctor
- B. Mr Zhou is to provide documents confirming his employment with Curtin University for the period 2005 to 2015. Mr Zhou is also required to provide written confirmation of his terms and conditions of employment with Curtin University throughout this period.

As I was sick and International Travel at moment. The original documents are with Curtin International Office, and all the email correspondences are within University system.

Given the lack of detail provided by the applicant the Commissioner's Associate was instructed to email the applicant on 30 June 2015 as follows:

My email to you of 15 June 2015 specified as follows:

By no later than 4.00 pm Monday 29 June 2015 Mr Zhou is to email the Commission, with a copy to the respondent's representative Ms van den Herik, the following information in relation to his claims for the period Mr Zhou says he was an employee of Curtin University between 2005 and 2015.

- A. 1. *Mr Zhou is to specify the amount he is due to be paid and the dates these claims cover, specified on a yearly basis, for each of the following:*
 - a. *Wages;*
 - b. *Annual Leave;*
 - c. *Superannuation; and*
 - d. *Sick leave.*
- 2. *The amount of Medical expenses being claimed for each item.*
- B. *Mr Zhou is to provide documents confirming his employment with Curtin University for the period 2005 to 2015. Mr Zhou is also required to provide written confirmation of his terms and conditions of employment with Curtin University throughout this period.*

By 4.00 pm Tuesday 30 June 2015, please confirm to me by return email:

- 1. that you have supplied to the Commission the information as specified in points A and B of my email; and
- 2. that this information has been emailed to the respondent's representative, Ms Jane van den Herik and when this occurred.

On 30 June 2015 the applicant responded stating the following, which was copied to the respondent:

I would like to confirm

1. that you have supplied to the Commission the information as specified in points A and B of my email; and
2. that this information has been emailed to the respondent's representative, Ms Jane van den Herik and when this occurred.

And I also can be contacted by [telephone number].

As discussed on June 15th, The representative from Curtin University also informed that the expense has been paid until Nov of 2008, but the contract said it will be ongoing even it is not signed by Kevin.

The Commission is of the view that the applicant has not provided the information required of him as specified in the email sent to him on 15 June 2015.

The Commission therefore orders that the applicant provide the following information to the Commission with a copy to the respondent by 4.00 pm 10 July 2015:

1. The amounts he claims he is due to be paid and the dates these claims cover, specified on a yearly basis, for each of the following:
 - (a) Wages;
 - (b) Annual Leave;
 - (c) Superannuation; and
 - (d) Sick leave.
2. The medical expenses being claimed and the amount for each item.
3. Documents confirming his employment with the respondent for the period 2005 to 2015.
4. Written confirmation of his terms and conditions of employment with the respondent for the period 2005 to 2015.

If the applicant does not provide the information required of him with a copy to the respondent by the due date as specified in this order, the matter may be listed for a show cause hearing as to why the matter should not be dismissed pursuant to section 27(1) of the Act.

(Sgd.) J L HARRISON,
Commissioner.

[L.S.]

2015 WAIRC 00442

DISPUTE RE PROCEDURAL FAIRNESS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)

PARTIES

APPLICANT

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM

ACTING SENIOR COMMISSIONER P E SCOTT

DATE

TUESDAY, 16 JUNE 2015

FILE NO.

C 9 OF 2015

CITATION NO.

2015 WAIRC 00442

Result	Directions issued
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr R Bathurst of counsel

Direction

WHEREAS this is an application made pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 15th day of June 2015 the Commission convened a conference for the purpose of conciliating between the parties; and

WHEREAS at that conference the respondent provided a Minute of Proposed Consent Orders to be issued in preparation for the hearing of the jurisdiction and preliminary issues of the matter and the Commission heard from the parties; and

WHEREAS the Commission formed the opinion that the issuing of Directions will assist in the conduct of the hearing;

NOW THEREFORE, the Commission, pursuant to the powers conferred under the *Industrial Relations Act 1979*, and by consent, hereby directs:

1. THAT by the 6th day of July 2015 the parties will file an agreed statement of facts in respect of the jurisdictional and preliminary issues raised in paragraphs 10 to 13 of the respondent's answer (the "Jurisdictional Issues").

2. THAT by the 20th day of July 2015 the applicant and the respondent will file and serve any additional evidence they wish to rely upon in respect of the Jurisdictional Issues.
3. THAT by the 27th day of July 2015 the respondent will file and serve an outline of submissions with regard to the Jurisdictional Issues.
4. THAT by the 3rd day of August 2015 the applicant will file and serve an outline of submissions with regard to the Jurisdictional Issues.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.**2015 WAIRC 00497****DISPUTE RE PROCEDURAL FAIRNESS**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)**PARTIES****APPLICANT**

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE TUESDAY, 7 JULY 2015
FILE NO. C 9 OF 2015
CITATION NO. 2015 WAIRC 00497

Result Direction amended
Representation
Applicant Mr D Stojanoski of counsel
Respondent Mr R Bathurst of counsel

Direction

WHEREAS this is an application made pursuant to Section 44 of the *Industrial Relations Act 1979*; and
 WHEREAS on the 16th day of June 2015 the Commission issued a Direction [2015] WAIRC 00442 (Directions) in preparation for the hearing of the jurisdictional issues in this matter; and
 WHEREAS by email on the 7th day of July 2015 the applicant advised that the parties are unable to meet the timeframe in which to comply with Direction 1; and
 WHEREAS the Commission is of the opinion that in the circumstances it is appropriate to amend the Directions;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs:

THAT Direction 1 of the Directions issued on the 16th day of June 2015 [2015] WAIRC 00442 be replaced by "THAT by the 8th day of July 2015 the parties will file an agreed statement of facts in respect of the jurisdictional and preliminary issues raised in paragraphs 10 to 13 of the respondent's answer (the "Jurisdictional Issues")".

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.**2015 WAIRC 00499****DISPUTE RE PROCEDURAL FAIRNESS**WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
STATE SCHOOL TEACHERS' UNION OF W.A. (INCORPORATED)**PARTIES****APPLICANT**

-v-

DIRECTOR GENERAL, DEPARTMENT OF EDUCATION

RESPONDENT

CORAM ACTING SENIOR COMMISSIONER P E SCOTT
DATE THURSDAY, 9 JULY 2015
FILE NO. C 9 OF 2015
CITATION NO. 2015 WAIRC 00499

Result	Direction further amended
Representation	
Applicant	Mr D Stojanoski of counsel
Respondent	Mr R Bathurst of counsel

Direction

WHEREAS this is an application made pursuant to Section 44 of the *Industrial Relations Act 1979*; and

WHEREAS on the 16th day of June 2015 the Commission issued Directions [2015] WAIRC 00442 in preparation for the hearing of the matter; and

WHEREAS an amendment to that Direction was issued on the 7th day of July 2015 [2015] WAIRC 00497; and

WHEREAS by email on the 8th day of July 2015 the respondent advised that the parties will be unable to comply with the amended Direction 1 and requested a further extension of time; and

WHEREAS the Commission is of the opinion that in the circumstances it is appropriate to amend the Directions;

NOW THEREFORE, the Commission, pursuant to the powers conferred on it under the *Industrial Relations Act 1979*, hereby directs:

THAT Direction 1 of the Directions issued on the 16th day of June 2015 [2015] WAIRC 00442 as amended by Direction issued on Tuesday, 7 July 2015 [2015] WAIRC 00497 be replaced by “THAT by the 15th day of July 2015 the parties will file an agreed statement of facts in respect of the jurisdictional and preliminary issues raised in paragraphs 10 to 13 of the respondent’s answer (the “Jurisdictional Issues”)”.

[L.S.]

(Sgd.) P E SCOTT,
Acting Senior Commissioner.

2015 WAIRC 00485

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	:	2015 WAIRC 00485
CORAM	:	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT
HEARD	:	TUESDAY, 9 JUNE 2015, THURSDAY, 11 JUNE 2015, TUESDAY, 16 JUNE 2015
DELIVERED	:	FRIDAY, 3 JULY 2015
FILE NO.	:	PSA 21 OF 2014
BETWEEN	:	BRUCE MIGHALL Applicant AND DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 AS THE WA COUNTRY HEALTH SERVICE Respondent

CatchWords	:	Reclassification appeal – Application to dismiss for want of prosecution – Higher level duties – Work value change – Comparison of claims in 2006 and 2014 – Organisational change and restructure
Result	:	Application to dismiss for want of prosecution dismissed
Representation:		
Applicant	:	Ms P Marcano
Respondent	:	Mr J Shepperd and Mr J Ross

Reasons for Decision

- 1 This is a reclassification appeal filed on 9 September 2014.
- 2 The respondent has applied to have the appeal dismissed for want of prosecution, citing a lengthy history of the applicant initially seeking a reclassification of one of two Records Clerk Level G1/2 positions to Records Officer Level G4 classification, lodged with the employer on 18 September 2006, again in 2013 and finally in 2014.
- 3 The 2006 claim was partially successful in that the CEC approved of a reclassification to Records Officer Level G3 on 10 December 2010. The respondent says the applicant relies on essentially the same changes as were relied on in 2006, which at that time justified the reclassification to Level G3.

- 4 The applicant disputes the series of events relied on by the respondent and says that following the submission of the original claim for reclassification in 2006, there was negotiation between the then applicants (one of whom is the current applicant) and their employer for them to remove certain aspects of the claim which they asserted warranted Level G4 and that Level G3 would then be supported. It then went to the CEC which approved Level G3. The applicant says that the higher level duties which were removed as part of that negotiation are now present in the current claim. A comparison of the E3 Position Evaluation Questionnaires of 18 September 2006 and 29 May 2014 and the E4 Reclassification Request Forms of the same dates and revised JDFs demonstrate that. The applicant does not seek the G4 level from 2006.
- 5 Therefore, the applicant says that there has been no lack of prosecution of the claim which arose in 2006. That matter was resolved by 2010 by negotiation, and this claim relates to the 2013 – 2014 period, notwithstanding that some of the matters, the subject of the original 2006 claim, which were removed, are now reflected in the current claim.

Consideration and conclusions

- 6 Attachment 8 of the respondent's documents contains a series of emails from 2010. An email from Murray Phillips, Senior Human Resource Officer, WA Country Health Service – South West addressed to Ms Marcano, the applicant's agent, dated 20 October 2010, the subject of which was 'RE: Reclassification – Bruce Mighall', reads:

Apologies for the delay. The revised submission has not yet been resubmitted to the CEC. I have revised the JDF in discussion with Bruce and that he is agreeable for the reclassification to seek an increase in classification of one level from Level 1/2 to Level 3. I have also obtained the A/RD endorsement for this and completed an updated addendum. I am seeking the advice of the Area Officer HR to ensure that what I have completed will allow a final decision to be made and that it won't bounce back again. I am reluctant to completely redo the reclassification report as I don't want to jeopardise the protected date for reclassification back-pay.

- 7 I take it that the Bruce Mighall referred to in the subject heading is the applicant in this matter and is the person referred to in the email as 'Bruce'.
- 8 Based on this information, I accept the applicant's submission that as part of the negotiation or discussions between the applicant, the Union on his behalf and the respondent in 2010, the applicant agreed for his request for reclassification to be downgraded from seeking Level G4 to Level G3 and that the Job Description Form (the JDF) was revised to bring the claimed duties within that level.
- 9 Further, an examination and comparison of the E3 Position Evaluation Questionnaires and the E4 Reclassification Request Forms for 18 September 2006 and 29 May 2014 demonstrate changes in the claimed aspects of the position. For example, in the E3 form, the years of experience required to perform the position which were initially claimed as one to three years are now four to six years. In the E4 form, there are differences in respect of question 3 regarding significant changes in work value, to amend '*monitor* the updating and maintenance of the electronic document records management system (EDRMS)' to *managing* that system, and *managing and maintaining the electronic application for archiving paper based records to the offsite storage facility* (emphasis added). There are other changes which relate to managing rather than administering and claims of an increased level of initiative and discretion in assessing the importance and urgency of matters. In respect of question 4, in lieu of dealing with certain matters in the Operational Records Manager's absence, it now refers to changes having occurred due to the abolition of the Records Manager's position.
- 10 During the process in 2010, a proposed JDF was included with the claim which said that the position '[d]evelops and provides training sessions' and '[d]evelops training material'. This was subsequently amended to delete reference to developing training sessions and training materials so that the position merely delivered training from materials developed by others. This too goes to support that the claim was downgraded from Level G4 to Level G3 at that time.
- 11 In all of the circumstances, I am satisfied that this is not the same claim that was ultimately considered and reflected in an approved change to Level G3 arising from the 2006 application in 2010. That original application was modified for the purposes of the matter proceeding at that point. This is a new claim in spite of some of the aspects of the claim being initially included in the 2006 claim, but were later withdrawn.
- 12 The respondent also argues that the applicant made the same claim in 2013 and that the 2014 claim is a further claim. However, the evidence suggests that the 2014 claim is an amendment to the 2013 claim. This was one of the options the employer appears to have suggested to the applicant at the time.
- 13 I also note that there is no suggestion that in May 2014, when the request for reclassification was lodged with the employer, the respondent objected to that reclassification claim being considered. It then went to the CRC in September 2014 and was rejected in November 2014. This appeal relates to the rejection of the claim in November 2014.
- 14 The respondent also argues that the workplace has moved on since the claim was made in that a new position of Recordkeeping Compliance Officer has been created at Level G4 which overtakes this position. This new position was approved for creation on 23 March 2015 following a Classification Evaluation Report signed on 7 January 2015.
- 15 The changed circumstances of the creation of the new position do not cancel out the applicant's right to have his reclassification claim based on increased work value, which arose in 2013 and was amended in 2014, determined. Organisational change and restructure does not negate the prospect that at least for some period, the duties, responsibilities and skills of the position may have been subject to work value change (Director General, Department of Education, PSA 76 of 1978, per Fielding C).
- 16 The question still arises for determination as to whether the applicant is able to demonstrate that the position he occupies has been the subject of work value change since its last assessment, justifying a higher level of classification. That will be the test.
- 17 Accordingly, the applicant is entitled to proceed with the reclassification appeal.

2015 WAIRC 00487

PARTIES	WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION BRUCE MIGHALL	APPLICANT
	-v-	
	DIRECTOR GENERAL OF HEALTH AS DELEGATE OF THE MINISTER FOR HEALTH IN HIS INCORPORATED CAPACITY UNDER S7 OF THE HOSPITALS AND HEALTH SERVICES ACT 1927 AS THE WA COUNTRY HEALTH SERVICE	RESPONDENT
CORAM	PUBLIC SERVICE ARBITRATOR ACTING SENIOR COMMISSIONER P E SCOTT	
DATE	FRIDAY, 3 JULY 2015	
FILE NO	PSA 21 OF 2014	
CITATION NO.	2015 WAIRC 00487	
Result	Application to dismiss for want of prosecution dismissed	

Order

HAVING heard Ms P Marcano as agent for the applicant and Mr J Shepperd and Mr J Ross on behalf of the respondent, the Public Service Arbitrator, pursuant to the powers conferred under the *Industrial Relations Act 1979*, hereby orders:

THAT the application to dismiss for want of prosecution be, and is hereby dismissed.

(Sgd.) P E SCOTT,
Acting Senior Commissioner,
Public Service Arbitrator.

[L.S.]

NOTICES—Appointments—

2015 WAIRC 00453

APPOINTMENTPUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, A/Senior Commissioner PE Scott to be the Public Service Arbitrator for a period of two years from the 22nd day of June, 2015.

Dated the 5th day of June, 2015.

 (Sgd.) A.R. BEECH

CHIEF COMMISSIONER A.R. BEECH

2015 WAIRC 00454

APPOINTMENTADDITIONAL PUBLIC SERVICE ARBITRATOR

I, the undersigned Chief Commissioner of the Western Australian Industrial Relations Commission, acting pursuant to the provisions of section 80D(2) of the *Industrial Relations Act 1979*, hereby appoint, subject to the provisions of the Act, Commissioner SJ Kenner to be an additional Public Service Arbitrator for a period of one year from the 26th day of June, 2015.

Dated the 5th day of June, 2015.

 (Sgd.) A.R. BEECH

CHIEF COMMISSIONER A.R. BEECH

NOTICES—General Matters—**2015 WAIRC 00477****SALARY CAP FOR LODGING CLAIMS OF UNFAIR DISMISSAL OR DENIAL OF CONTRACTUAL BENEFITS**

An employee whose contract of employment provides for a salary greater than \$153,900.00 cannot have the Commission decide whether they have been unfairly dismissed or have been denied a benefit to which they are entitled under their contract of employment.

Section 29AA(3) and (4) of the *Industrial Relations Act 1979* provides that the Commission must not determine a claim for harsh, oppressive or unfair dismissal or a claim for a denied contractual benefit if an industrial instrument does not apply to the employment and the contract of employment provides for a salary which exceeds the prescribed amount.

What is meant by an industrial instrument is defined in section 29AA(5) of the *Industrial Relations Act 1979* and was discussed by the Full Bench in *Thomas Quinn v Kalgoorlie Consolidated Gold Mines Pty Ltd* [2006] WAIRC 05220; (2006) 86 WAIG 2725.

The prescribed amount of the salary is determined by Regulations 5 and 6 of the Industrial Relations (General) Regulations 1997. The amount is adjusted each July 1.

The figure that will apply after 1 July 2015 has been calculated by the Registrar as being \$153,900.00. The amount is a matter for the Commission to determine so this figure must be seen as a guide, until such time as the Commission may determine a different amount.

